

Deposition of Coleman, Penny, 3/7/2014

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STIFEL NICOLAUS & COMPANY, INC.,
STIFEL FINANCIAL CORP.,
SAYBROOK FUND INVESTORS, LLC
(successor to SAYBROOK TAX EXEMPT
INVESTORS, LLC),
LDF ACQUISITION, LLC,
WELLS FARGO BANK, N.A.,
and GODFREY & KAHN, S.C.,

Plaintiffs,

vs.

Case No. 13-CV-372

LAC DU FLAMBEAU BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS and
LAKE OF THE TORCHES ECONOMIC
DEVELOPMENT CORPORATION,

Defendants.

Deposition of PENNY J. COLEMAN

Thursday, February 27th, 2014

10:13 a.m.

at

GASS WEBER MULLINS LLC
309 North Water Street
Milwaukee, Wisconsin

Reported by Sarah A. Hart, RPR/RMR/CRR

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Deposition of PENNY J. COLEMAN, a witness in the
above-entitled action, taken at the instance of the
Plaintiffs, pursuant to the Federal Rules of Civil
Procedure, pursuant to notice, before Sarah A. Hart,
RPR/RMR/CRR, and Notary Public, State of Wisconsin,
at GASS WEBER MULLINS LLC, 309 North Water Street,
Milwaukee, Wisconsin, on the 27th day of February,
2014, commencing at 10:13 a.m. and concluding at
5:17 p.m.

A P P E A R A N C E S:

GASS WEBER MULLINS LLC, by
Mr. David J. Turek
309 North Water Street
Milwaukee, Wisconsin 53202
Appeared on behalf of Plaintiffs
Stifel Nicolaus & Company, Inc.
and Stifel Financial Corp.

GRIPPO & ELDEN, by
Ms. Laura K. McNally
Mr. Rami Fakhouri
111 South Wacker Drive
Chicago, Illinois 60606
Appeared on behalf of Plaintiffs
Saybrook Fund Investors, LLC
(successor to Saybrook Tax Exempt
Investors, LLC), LDF Acquisition, LLC,
Wells Fargo Bank, N.A.

FOLEY & LARDNER LLP, by
Mr. James R. Clark
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
Appeared on behalf of Plaintiff
Godfrey & Kahn.

1 A P P E A R A N C E S (cont'd):

2 HOGEN ADAMS, by
3 Ms. Vanya S. Hogen
4 1935 West County Road B2, Suite 460
5 St. Paul, Minnesota 55113
6 Appeared on behalf of the Defendants.

7 HANSEN REYNOLDS DICKINSON CRUEGER LLC, by
8 Mr. Paul R. Jacquart
9 316 North Milwaukee Street, Suite 200
10 Milwaukee, Wisconsin 53202
11 Appeared on behalf of the Defendants.

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TRANSCRIPT OF PROCEEDINGS

PENNY J. COLEMAN, called as a witness herein,
having been first duly sworn on oath, was examined
and testified as follows:

MS. McNALLY: Good morning, Ms. Coleman.
My name is Laura McNally. I represent the Saybrook
parties and LDF Acquisition, LLC, and Wells Fargo in
this action. I'll be asking you questions during
your deposition today.

Do the other parties want to say who's
here on the record?

MR. TUREK: Sure. David Turek on behalf of
Stifel Nicolaus and Stifel Financial.

MR. CLARK: Jim Clark on behalf of Godfrey
& Kahn.

MR. JACQUART: Paul Jacquart for the tribal
parties.

MS. HOGEN MOLINE: Vanya Hogen Moline for
the tribal parties.

MS. McNALLY: And this is Rami Fakhouri.
He's also from my law firm for Saybrook, LDF, and
Wells Fargo.

THE WITNESS: Okay.

EXAMINATION

1 BY MS. McNALLY

2 Q Have you been deposed before?

3 A I have been deposed before, yes.

4 Q And have you taken depositions before?

5 A I think I assisted in one.

6 Q Okay. Not recently, I'm guessing?

7 A No. This is a long time ago.

8 Q All right. So I'll just quickly review some of the
9 cautions for the beginning of a deposition. I'm sure
10 you're familiar with these things, but --

11 A Okay --

12 Q -- just so we're all on the same page.

13 It will be important that you give
14 answers that are words, instead of nods or sounds
15 like "um-hmm" so that the court reporter can
16 correctly collect what it is that you say.

17 Does that make sense?

18 A Yes.

19 Q And that reminded me. If you can, make sure that you
20 speak up so that she can hear you and that we have a
21 clear record of your answers and my questions.

22 A Okay.

23 Q Okay? And please allow me to finish my questions
24 before you answer, and I'll try and do my best so
25 that I let you finish your answers before I ask the

1 next question.

2 A Okay.

3 Q And if I think you're done and ask a question but you
4 weren't finished, please stop me and finish your
5 answer, okay?

6 A Okay.

7 Q I'd ask that you ask for any clarification if you
8 don't understand a question so that we both know what
9 we're talking about, okay?

10 A Okay.

11 Q And if you answer a question, I'll assume that you
12 understood what I was asking, okay?

13 A Yes.

14 Q Okay. Feel free if you need to take a break at any
15 time; just let me know, and as long as a question
16 isn't pending, we can do that.

17 If you need to speak with your counsel
18 at any time, that's fine as well, but please ask --
19 unless it relates to privilege, don't do that
20 unless -- while a question is pending, okay?

21 A Okay.

22 Q All right. You understand you're under oath, just as
23 if you were in a courtroom procedure, correct?

24 A Yes.

25 Q Okay. And I have to ask this: Are you on any

1 medication or is there any reason you can't give full
2 and complete truthful testimony here today?

3 A No.

4 Q Okay. And you said you've been deposed before?

5 A Um-hmm. Yes.

6 Q Can you tell me what that -- what the occasion was of
7 your prior deposition?

8 A I have been deposed on a personnel matter and once on
9 a personal matter.

10 Q Okay. And when were these depositions?

11 Let's start with -- sorry. Any other
12 deposition?

13 A Not that I can remember.

14 Q Okay. Let's start with the personnel matter.

15 When was that?

16 A That was about 15 years ago.

17 Q Okay. And were you a party or a witness?

18 A I was working for the federal government. I was a
19 witness, I guess.

20 Q Were you a fact witness or an expert witness?

21 A Fact.

22 Q And in the personal matter, when was that?

23 A 1982, I believe.

24 Q Okay. And were you a fact witness or a party?

25 A I was a fact witness, I guess.

1 Q Okay. Were you deposed in that trial or at a
2 deposition?

3 A Deposition.

4 Q Okay. And where was that pending?

5 A Arlington, Virginia.

6 Q And what do you mean by a "personal matter"?

7 A Personal matter?

8 Q Um-hmm.

9 A Oh, it was a divorce.

10 Q Okay. Fact witness in somebody else's divorce?

11 A Yes.

12 Q That's a lot of fun.

13 A Truly.

14 Q Okay. We don't need to spend more time on that.

15 Can you tell me your opinions that
16 you're planning to offer as an expert witness in this
17 case?

18 A Can I tell you my opinions?

19 Q Yes, please tell me your opinions that you are
20 offering as an expert witness in this case.

21 A Okay. I was asked to describe the -- NIGC's
22 processes, how they got into the two-part processes
23 for reviewing management contracts and what we refer
24 to as "R contracts." They're called "R contracts"
25 because in the database there was an "R" on them for

1 "review." And I was asked to describe those two.

2 And then to look at a long list of
3 documents, including an indenture and security
4 agreement, tribal agreement, several other documents,
5 and look to see if they contained indicia of
6 management which the NIGC might determine are
7 management contracts.

8 Q Okay. Were you asked to do anything else?

9 A I would have to think about that. Not off the top of
10 my head.

11 Q So you said you were asked to describe the
12 two-part -- the history of the two-part process?

13 A Uh-huh.

14 Q And then the long list of -- you reviewed the long
15 list of documents --

16 A Yes.

17 Q -- for indicia of management?

18 A Yes.

19 Q And right now you can't think of any other
20 assignments?

21 A Right.

22 Q Okay. My question, though, was what are your
23 opinions. So those are your assignments, but what
24 are the opinions you're planning to provide as an
25 expert witness?

1 A Well, other than the background, I will be saying
2 where I think certain provisions within the contracts
3 indicate management, based on what the NIGC has done
4 in the past.

5 Q Okay. Anything else? Any other opinions?

6 A I guess the only addition to that is that looking at
7 the management, it will be -- I'll be looking at
8 whether collectively the documents indicate
9 management or singly indicate management.

10 Q Okay. And what are your opinions as to indications
11 of management?

12 A What are indications of management?

13 Q No. What are the opinions you've reached?

14 A Well, can I use my affidavit and I can run through
15 it?

16 Q Okay. Is it fair to say that your affidavit contains
17 your opinions?

18 A Generally. They're -- I saw one mistake on the
19 affidavit. I've kind of looked at the contracts a
20 little more, and there's some -- there's possibly
21 other -- other indications.

22 Certainly, the affidavit -- one of the
23 things it doesn't do is it doesn't go into fulsome
24 detail on how -- how much these documents are related
25 or interrelated.

1 Q Um-hmm.

2 A Because there was so much in the documents, there
3 were so many times that one document was dependent
4 upon another -- either they're referenced or they're
5 incorporated -- that I tried to limit myself more to
6 just a half a dozen and didn't spend time going --
7 didn't -- repeating everything that was in every
8 document.

9 Q Okay. Would you say there are any general -- those
10 are examples --

11 A Um-hmm.

12 Q -- you're talking about right now?

13 A Um-hmm.

14 Q Would you say there are any broad categories of
15 opinions that aren't in your affidavit that you're
16 planning to give in this case?

17 A "Broad categories." I don't understand.

18 Q Right. The things you're saying are missing are some
19 examples of, you just mentioned, interrelationships.

20 Are there any big opinions that aren't
21 contained in your affidavit?

22 A I don't think so.

23 Q Okay. I'm not trying to trick you. I'm just
24 saying --

25 A I just don't know what you're -- what you're getting

1 at, so I don't really...

2 Q Well, I guess there are many issues in this case.

3 A Right.

4 Q And so I just want to make sure that your
5 affidavit -- are there any issues that just aren't
6 addressed at all in your affidavit that you're
7 planning to opine on? That's what I'm asking.

8 A Good question. No, there isn't anything else I'm
9 planning on opining on.

10 Q All right. We'll come back to those issues.

11 A Okay.

12 Q Can you tell me, what did you do to prepare your --
13 to prepare for this deposition?

14 A To prepare for this deposition?

15 Q Um-hmm.

16 A I went back and looked at the notice of violation;
17 final commission decisions; and the general counsel
18 opinions that are on the website; and looked at my
19 stack of them, which I had run off over the course of
20 time; looked at the stack of court cases that I had.

21 I didn't do any real research. I know
22 there's lots of decisions out there, but I had a
23 stack, and so I reread them.

24 I basically breezed through several of
25 the briefs that have been filed. I didn't spend a

1 lot of time on them because they didn't tend to get
2 to the issues that I was dealing with, but I just
3 wanted to know what was going on.

4 Q Um-hmm.

5 A I asked for guidance from Vanya about how you do a
6 deposition because, despite my years of experience,
7 deposition is not something I do. And sat and kind
8 of tried to figure out what questions that you might
9 ask so that I would be prepared.

10 Q Anything else?

11 A No. I chatted with the lawyers on that subject, what
12 questions are they going to be interested in.

13 Q Okay. Anything else?

14 A I reread some emails.

15 Q Can you think of anything else you did?

16 A That's pretty much it.

17 Q Okay. So you looked at -- you said you looked at
18 notice of violations, general counsel opinions, and
19 letters on the website?

20 A Yes.

21 Q When you say "on the website," do you mean all of
22 those things were on the website or just the letters
23 were on the website?

24 A They were all on the website.

25 Talking about final commission

1 decisions, they -- the National Indian Gaming
2 Commission is an enforcement agency. And so not only
3 do they approve or disapprove management contracts,
4 they also take enforcement action. And so in both
5 management contract appeals or enforcement actions,
6 they would be final agency decisions.

7 And "NOVs" are "notices of violation."
8 Those are the enforcement document. They're actually
9 the initial decision that is a final agency action,
10 if they're not appealed.

11 So I looked at those to see what
12 would -- what had been said, see if there was
13 anything new, see if there was any changes.

14 Q Okay. Anything new or changes since when?

15 A Since I left the commission in 2010.

16 Q Are these materials that you looked at in preparing
17 your affidavit?

18 A Yeah. I think some of the later materials -- the
19 general counsel opinions I don't think were all on
20 the website when I prepared it, but -- and I was
21 looking at those just to see if there was any change
22 in analysis from -- from 2010 when I left.

23 Q Right. Was there anything -- but these are things
24 you did not necessarily all look at at the time you
25 drafted and signed your affidavit; is that right?

1 A Those -- those from -- some into 2012 and 2013 I
2 don't think were on the website when I prepared it.

3 Q And did you find that any of these things were new,
4 or were there changes?

5 A I only saw one change.

6 Q What was that?

7 A And that was the -- these general counsel opinions
8 have fairly standard language when it comes to the
9 Wells Fargo case.

10 And after the Wells Fargo case, you
11 know, this language had been added because the office
12 generally agreed with the outcome of that decision
13 and -- but -- so what the decisions -- what the --
14 those opinions had said was that under the UCC and
15 available remedies under law, that those are probably
16 not -- that -- that -- that they didn't intend in
17 those -- in contracts that said "You have available
18 remedies under law," the contractors didn't intend to
19 mean that that meant you could just go ahead and
20 appoint a receiver to manage the facility.

21 Well, then they became more -- they've
22 become more nuanced or just a little bit different in
23 the sense that now they tend to say, "It looks like
24 appointing a receiver isn't even an available
25 remedy," so...

1 Q Is not an available remedy? Is that what you said?

2 A Right.

3 Q Is not an available remedy?

4 A So it's not one of those broad categories of
5 available remedy. So, consequently, there's no
6 indicia of management when you say "available
7 remedy."

8 Q And that was a change that you noticed since the time
9 you signed your affidavit?

10 A Yes.

11 Q Okay. And does that change your opinion, any of the
12 opinions you've included in your affidavit?

13 A No.

14 Q And when you talk about these letters, are these
15 referred to as "declination letters"?

16 A Yes.

17 Q Yes? Okay.

18 Then you talked about you had a stack
19 of cases?

20 A Um-hmm.

21 Q Did you rely on those cases in forming your opinions
22 in your affidavit?

23 A I -- I don't think I referenced any cases.

24 Q Yeah, I'm not asking if you referenced any cases.

25 I'm asking if they were something you used -- you

1 relied on in reaching your conclusions in your
2 affidavit.

3 A Well, they were part of the body of knowledge that I
4 have, just from all of my years of experience. And
5 so they helped just kind of remind me, oh, yeah, you
6 know -- I can't remember what they reminded me,
7 actually. I would have to look at them again.

8 Q Did you -- were any of these cases in the stack of
9 documents that you didn't have -- or didn't refer to
10 at the time you drafted your affidavit?

11 A I had them when I drafted my affidavit. I don't
12 really remember if I referred to them.

13 Q Okay. Was there anything you saw when you reviewed
14 them in preparing for the deposition that led you to
15 change any of the conclusions you included in your
16 affidavit?

17 A No.

18 Q Okay. Have you provided those documents to your
19 counsel?

20 A Yes.

21 Q Okay. Can you remember what --

22 MS. McNALLY: Maybe I can shorten this if
23 you can tell me, is that the stack of cases we
24 received?

25 MS. HOGEN MOLINE: Yes.

1 MS. McNALLY: Okay. All right.

2 BY MS. McNALLY:

3 Q Are there any cases that you reviewed in preparing
4 for your deposition that you did not provide to your
5 counsel?

6 A No.

7 Q Okay. Now, you said you reviewed some briefs?

8 A The briefs that -- some of the briefs that were filed
9 in the court cases that are going on with you all.

10 Q Okay. Which case is that? This case, the one
11 pending in federal court right now?

12 A I think so, yes.

13 Q Okay. Did you review briefs in any other case that
14 involves these parties?

15 A I probably did. I don't remember specifically which
16 ones.

17 Q That was in preparation for your deposition?

18 A Yes.

19 Q Okay. When did you do this preparation?

20 A Last week. I spent the day.

21 Q What documents -- which briefs do you recall
22 reviewing?

23 A This is how briefly I reviewed them. I don't really
24 recall which ones.

25 Q Do you remember when you did this, when you did this

1 review? When last week?

2 A I think it was Sunday.

3 Q Okay. Did you review any briefs that related in
4 particular to use of experts in this case?

5 A No.

6 Q Okay. How did you come to have the briefs you
7 reviewed?

8 A I asked counsel.

9 Q What did you ask?

10 A I said it would be helpful if I saw what people are
11 talking about on the -- in the court case. And I
12 didn't know where the court case was; I didn't know
13 what court we were in. I -- you know, I just haven't
14 been following this at all, and so...

15 Q Did they select the briefs to send to you?

16 A Yes.

17 Q Did you review the briefing on the motion for
18 preliminary injunction, do you think?

19 A I would --

20 Q You don't need to guess. If you don't know, you
21 don't know.

22 A Yeah, I just don't remember.

23 Q Okay.

24 A I didn't look at the headings. I just was looking at
25 what they said, and -- like I said, very briefly.

1 Q Did you review the complaint, do you think?

2 A Not recently, no. Definitely not that.

3 Q Okay. Did you review any declarations or affidavits
4 filed by any other people -- any other experts in
5 this case?

6 A I looked at Kevin Washburn's and Perry Israel's and
7 Elaine Trimble Saiz.

8 Q Okay. And when did you review Kevin Washburn's
9 declaration -- I'm sorry. I think it's an affidavit.

10 When did you review it?

11 A I don't know exactly what day. I pretty much spent
12 one day trying to review the materials.

13 Q Okay.

14 A And I really don't remember if it was Sunday for
15 sure, but, you know, I just --

16 Q Okay.

17 A -- I spent a day trying to go through those things,
18 and that's pretty much it.

19 Q I'm not trying to grill you if it was Saturday versus
20 Sunday --

21 A Yeah.

22 Q -- I'm just trying to -- if it was recently, you
23 recently reviewed it.

24 A Yes, I recently looked at them.

25 Q Okay. And do you remember what the case was in which

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1 Kevin Washburn filed his affidavit that you reviewed?

2 A I'm pretty sure it was the one that's pending.

3 Q In this action?

4 A Yeah.

5 Q Okay. And Perry Israel, when did you review his
6 declaration -- or affidavit?

7 A I looked at them all at the same time.

8 Q Okay. And Elaine Trimble Saiz?

9 A Same time.

10 Q Okay. Had you reviewed those at any time before this
11 last week? Let's start with Kevin Washburn.

12 Had you reviewed Kevin Washburn's
13 affidavit before this past week?

14 A I reviewed Kevin Washburn's affidavit about the same
15 time that the district court issued the decision.

16 Q Which decision?

17 A The first one.

18 Q Are you talking about Judge Randa's decision in --
19 there have been enough district court decisions --

20 A Yeah, I know. Well, and consequently, I can't tell
21 you for sure.

22 Q Okay.

23 A I can tell you that I remember reading his affidavit
24 as part and parcel of the decision that said that the
25 indenture and the other contracts were management

1 contracts.

2 Q Okay. Thank you. And then you reviewed it again
3 recently.

4 Did you review it in between those two
5 times?

6 A I'm sure I reviewed it when I was preparing the
7 affidavit.

8 Q Okay. And in reviewing it this week, did you see
9 anything that would lead you to change anything you
10 said in your affidavit?

11 A No.

12 Q Okay. Now, Perry Israel's affidavit, when did you
13 first review that?

14 A I don't -- I don't remember reviewing it any time
15 except for this last week.

16 Q Okay. Did you see anything in his affidavit that
17 would change anything you said in your affidavit?

18 A No.

19 Q Okay. How about Elaine Trimble Saiz's affidavit?
20 When did you first review that?

21 A I don't know how many affidavits have been filed by
22 her.

23 Q Um-hmm. Okay.

24 A But -- so all I can say is that I reviewed an
25 affidavit by her --

1 Q Okay.

2 A -- in preparation -- when I was preparing the
3 affidavit -- my affidavit.

4 Q Okay. And then you saw it again this past week?

5 A Yes.

6 Q Was there anything that you read this past week that
7 changed your opinions that you filed in the affidavit
8 in this case?

9 MS. HOGEN MOLINE: Are you asking her that
10 question generally, or in the Saiz affidavit?

11 BY MS. McNALLY:

12 Q Is there anything you saw in the Saiz affidavit that
13 would lead you to change -- when you reviewed it this
14 week, that would lead you to change anything you said
15 in your affidavit that you filed in this case?

16 A No.

17 Q Okay. And just for clarification --

18 A Um-hmm.

19 Q -- you filed -- you signed an affidavit in a case
20 that's pending in Waukesha County as well. Do you
21 recall doing that?

22 A Yes.

23 Q Okay. So today, if I talk about your affidavit, I'm
24 going to be talking about the affidavit that you
25 filed in this case.

1 A Okay.

2 Q And not the one in Waukesha.

3 A Okay.

4 Q If I refer to the Waukesha -- your Waukesha
5 affidavit, that will be -- that's when I'm talking
6 about that --

7 A Okay.

8 Q -- other one.

9 A Okay.

10 Q So just so the record's clear, all the questions I've
11 been asking about changes to your affidavit, you were
12 answering as to the affidavit filed in this case?

13 A Yes.

14 Q Okay. How much time did you spend preparing for this
15 deposition?

16 A I don't know. I spent more time trying to pull
17 together the documents for you.

18 Probably, if you count the time I
19 spent pulling together the documents, which tended to
20 take quite a while, 20 hours.

21 Q Okay. Are you being compensated by the hour?

22 A Yes.

23 Q All right. We'll come back to that in a second.

24 You said you reread some emails?

25 A Um-hmm.

1 Q When you say "reread," when did you read them before?

2 A When I wrote them --

3 Q Were these emails where you were a sender, recipient,
4 or copied on the email?

5 A Yes.

6 Q Okay. Can you describe the emails you reviewed?

7 A Well, there were emails back and forth with counsel,
8 and then there were a few emails back and forth with
9 Rob Gibbs.

10 Q With Rob Gibbs, okay.

11 A Um-hmm, Gibbs.

12 Q Okay. And why did you review these emails?

13 A Well, most of them were -- I thought were going to be
14 responsive to the document request.

15 Q Okay. But then you changed -- did you decide they
16 weren't responsive?

17 A No. Counsel told me that you all had agreed you
18 didn't need those.

19 Q All right. And when you said "communications with
20 counsel," you mean counsel in this action?

21 A Yes.

22 Q Okay. You spoke with counsel in preparation for this
23 deposition.

24 Did you speak with anyone else in
25 preparation for this deposition?

1 A I talked briefly to Rob Gibbs.

2 Q Did you talk to Rob Gibbs about the issues involved
3 in this case?

4 A No. I -- no. I was -- I called him to find out if
5 I -- if I had worked for Saybrook on an affidavit I
6 had drafted.

7 Q In another matter?

8 A Yeah.

9 Q Okay. Did you speak with Rob Gibbs about the issues
10 in this case?

11 Let me ask it this way: Did you speak
12 with Rob Gibbs about the substance of your testimony
13 today?

14 A He said something to me.

15 Q Okay. Did you speak --

16 A I didn't -- I hadn't really asked him about it, but
17 we kind of -- it was just kind of an off-the-cuff,
18 "oh," kind of a deal.

19 Q Okay. And did you speak about the substance of the
20 testimony you were going to be giving here today
21 relating to your opinions?

22 A Well, yeah, I think so.

23 Q What did you say?

24 A Well, I didn't say anything. He said something to
25 me.

1 Q Okay. Did you speak with anyone else?

2 A No.

3 Q Did you speak with Perry Israel?

4 A No.

5 Q Have you spoken with Perry Israel at any time about
6 the issues involved in this case?

7 A I don't think so.

8 Q Have you spoken with Elaine Trimble Saiz about the
9 issues in this case?

10 A No.

11 Q Have you spoken with Kevin Washburn about the --

12 A No.

13 Q -- issues in this case?

14 If you can just make sure I get to ask
15 the whole question so the record's clear.

16 A Sorry.

17 Q All right. Can you briefly describe your academic
18 background, starting with college?

19 A I went to a small college at -- in South Dakota and
20 got a B.S. degree in English and library science, and
21 took a few graduate courses while I was a teacher.
22 And then I went to the University of South Dakota and
23 got a law degree.

24 Q Okay. Was that Northern -- for undergrad, was that
25 Northern State University?

1 A That's what it's called now, yes. I think.

2 Q What was it called --

3 A No. I think it's Northern University -- I'm not real
4 sure what it's called now.

5 Q What was it called then?

6 A I think it's -- well, it wasn't called Northern
7 Normal. It was called Northern State, I believe.

8 Q Okay.

9 A It's had lots of names. It's grown over the years.

10 Q Okay. And when did you graduate?

11 A From undergrad? I think it was 1976.

12 Q Okay. And then were you involved in any
13 organizations or -- any organizations that would have
14 had involvement in Native American issues?

15 A Any organization. What do you mean?

16 Q Like any clubs or any --

17 A In undergrad?

18 Q Yeah, in undergrad.

19 A No.

20 Q Okay. And did your studies at that time focus in any
21 way on Indian law issues?

22 A In undergrad?

23 Q Right, in undergrad.

24 A No.

25 Q Okay. And then you said you did some graduate work

1 while you were teaching. That was -- what's the
2 teaching part of that?

3 A I was teaching English.

4 Q Okay.

5 A And we were required to take some classes as part of
6 our teaching degree, continuing education kind of
7 thing.

8 Q Was that high school?

9 A Yeah. High school and junior high.

10 Q And were the graduate classes education-related?

11 A Yes. I think they were on things like diversity and
12 kinds of things that you want teachers to know about.

13 I don't really remember. This was a
14 very long time ago.

15 Q Sure. And did any of those issues relate to Indian
16 law topics, any of those classes?

17 A No.

18 Q And you said you went to law school?

19 A Yes.

20 Q Where did you go and when did you graduate?

21 A I went to the University of South Dakota. I
22 graduated in 1981.

23 Q Were you originally from South Dakota?

24 A Yes, I am from South Dakota.

25 Q All right. Did you have any activities or academic

1 focus on Indian issues at the time?

2 A I had -- I took a class in Indian law.

3 Q Was that second or third year, I'm guessing?

4 A It was second or third year.

5 Q Okay. Anything else?

6 A In Indian law?

7 Q Right, in Indian law.

8 A No.

9 Q Were you on a journal or any club, any organization
10 on Indian-related issues?

11 A No. There weren't any.

12 Q Okay. Any other graduate training that you took
13 after law school?

14 A No.

15 Q Okay. Have you had any continuing education since
16 law school?

17 A Yes.

18 Q Okay. Can you just generally describe what you've
19 done?

20 A I'm bar'ed in Virginia, so I take a minimum of 12
21 hours a year, two of which have to be ethics.

22 And then in addition to that, I try to
23 either go to the Federal Bar Association Indian Law
24 conference, or I speak and get credit for speaking.

25 I probably do mostly Indian law CLE,

1 but also try to do other CLEs that include -- you
2 know, to help you with your practice.

3 Q Okay. Have you had any continuing education on
4 tribal financing?

5 And I'm putting aside the
6 presentations you gave or speeches you made, but ones
7 where you attended and learned from someone else.

8 A I've attended NAFOA conferences.

9 Q How do you spell that?

10 A N-A-F-O-A, I think. Native American Finance -- I
11 can't remember what the "OA" stands for.

12 Q And NAFOA is related to tribal financing?

13 A That's what -- yes.

14 Q Okay. And do you remember when you attended those?

15 A Two years ago I think is the last time I attended
16 one.

17 Q Okay. When else?

18 A And the year before that. And in addition, the
19 Indian law classes I sometimes take are about
20 financing.

21 Q I'm sorry. I couldn't hear you.

22 A The Indian law classes that they have midyear in
23 D.C., I try to get to that.

24 Q Who is "they"?

25 A "They," the FBA.

1 Q Federal Bar Association?

2 A Yes.

3 Q All right. You said that you went to the NAFOA
4 conference two years ago and the year before that.

5 A Yes.

6 Q Before that did you go?

7 A I don't -- I don't remember going any other time to
8 one of them.

9 Q Okay. And in the midyear Indian law -- the midyear
10 meetings of the Federal Bar Association, did they
11 talk about tribal financing?

12 A Sometimes.

13 Q Okay. Do you have a memory of being --

14 A No.

15 Q How about have you had any continuing education on
16 management of casino operations?

17 A Continuing education? Other than being -- setting up
18 a commission?

19 Q Right. Not the work you did, but did you have --
20 have you had any formal training relating to
21 management of casino operations?

22 A I'm not sure.

23 Q Okay. Do you recall having any formal training on
24 issues relating to management contracts?

25 A Formal training on management contracts?

1 Q Um-hmm.

2 A No.

3 Q Okay. Do you recall having any formal training on
4 IGRA?

5 A Yes.

6 Q Okay. And where was that?

7 A The National Indian Gaming Association has an annual
8 conference and a midyear conference, and I go to
9 those regularly. I don't always get to them, but I
10 go to them regularly.

11 Also G2E.

12 Q What's that?

13 A It --

14 Q Is that the letter "G" and the number "2" --

15 A Yeah.

16 Q -- and the letter "E"?

17 A Yeah.

18 Q Okay.

19 A It's a very big conference in Las Vegas. I've gone
20 to it probably the last 10 or 15 years. And it
21 always has a tribal gaming conference -- or section;
22 some of which I've taught, and some of which I've
23 attended.

24 Q Okay. Did you say that you -- I'll ask it this way:
25 How many times have you gone to the National Indian

1 Gaming Association conferences do you think, roughly?

2 A Twenty, 25.

3 Q Okay. And G2E?

4 A Fifteen.

5 Q Have you had any formal education or training
6 relating to NIGC regulations?

7 A Yes, I have.

8 Q Okay. You're chuckling.

9 A I'm chuckling because, of course, since I was there
10 at its inception, we were the ones who did the
11 training. But once I left in 2010, I did go and --
12 to a training that NIGC provided, and, actually, I
13 had two different trainings from NIGC.

14 Q Okay. Can you tell me about the first one?

15 A The first one was on setting up a commission. It was
16 something that I had organized to help train the
17 tribal council on what you need for a regulatory
18 body, what kinds of things are required. And I sat
19 in on it.

20 Q So you organized it, and then you attended it?

21 A Yes.

22 Q And then when was -- that was in 2010?

23 A No. That was 2013.

24 Q Okay. What was it called?

25 A It didn't have a name.

1 Q Was it at the NIGC?

2 A No. The NIGC came to us.

3 Q Who is "us"?

4 A Pardon?

5 Q Who is "us"?

6 A The Mashpee Wampanoag Tribal Council and the Mashpee
7 Wampanoag Tribal Gaming Commission.

8 Q And you have a formal role with them?

9 A I did at the time.

10 Q Okay. And what was that?

11 A I was the chair of the gaming commission.

12 Q When did you set that training up? I think you
13 said -- I'm not trying to put words in your mouth.
14 I'm trying to understand.

15 Did you say you set that training up
16 when you were at the NIGC and then you attended it?

17 A No.

18 Q Oh, okay. When did you set it up?

19 A I set it up --

20 Q As part of the Gaming Commission?

21 A As part of the Gaming Commission, yes.

22 Q Okay. And you invited them to come in, and they made
23 a presentation that you attended?

24 A Yes.

25 Q Got it.

1 Okay. And then you said there was a
2 second training as well?

3 A Yes. They were -- the NIGC was having its regional
4 training at Saint Regis Mohawk at the Akwesasne
5 Reserve. And so I attended that.

6 Q And what was the topic of that training?

7 A The one I can best remember is the minimum internal
8 control standards. They had other topics, but I
9 don't remember all of them.

10 Q And when was this training?

11 A 2013.

12 Q Did you learn anything at either of these trainings
13 that caused you to change the opinions you're
14 providing in this case?

15 A No.

16 Q Do you recall whether these trainings were before or
17 after you submitted an affidavit in this case?

18 A I don't recall.

19 Q Okay. I would like to talk about your work history
20 on issues relating to Indian law.

21 A Okay.

22 Q We don't need to -- we can skip over any, like, high
23 school -- when you were teaching.

24 So let's talk about post-law school,
25 okay?

1 A Okay.

2 Q Where did you start after law school?

3 A After law school I started at the Office of the
4 Solicitor in the Department of the Interior in the
5 Division of Indian Affairs in their General Indian
6 Legal -- General Indian Law section.

7 Q When you were in law school, did you have any
8 employment relating to Indian law issues?

9 A No.

10 Q Any internships or unpaid work?

11 A I had an internship at the Crow Creek Legal Aid
12 office, worked on what were called Section 2415
13 claims.

14 Q And what are those?

15 A If I remember correctly, Congress had passed a law
16 establishing a statute of limitations on a number of
17 claims that individual Indians and the Indian tribes
18 could bring against the federal government. And the
19 legal aid office was apparently funded to -- to
20 research the claims.

21 Q Okay. Did that relate to gaming in any way?

22 A No.

23 Q Okay. You were at that organization; then you were
24 at the Department of the Interior, right?

25 A Right.

1 Q When were you there?

2 A Started in 1981. Left there in 1984 -- excuse me.
3 '94.

4 Q Okay. And then in 1994, where did you go?

5 A National Indian Gaming Commission.

6 Q And how long were you there?

7 A Till 2010.

8 Q Okay. And then in 2010, where did you go?

9 A 2010, I didn't go anywhere for a while.

10 Q Okay.

11 A And I established a consulting firm, and then
12 established -- in 2011 established a law firm.

13 Q Okay. The consulting firm, did you start that -- you
14 said in 2010 you started the consulting firm?

15 A Um-hmm.

16 Q What's the name of that firm?

17 A Gwe: Nis Consulting.

18 Q Can you spell that for the court reporter.

19 A G-W-E, colon, space, N-I-S.

20 Q Is that a present organization?

21 A Yes.

22 Q And then you also began a law firm in 2011, you said?

23 A Yes.

24 Q And what is that called?

25 A Coleman Indian Law.

1 Q Okay. And does that still exist?

2 A Yes.

3 Q Any other employment that we haven't covered?

4 A Well, we discussed that I was chair of the Mashpee
5 Gaming Commission.

6 Q Okay.

7 A And I'm --

8 Q When was that?

9 A That was -- can I look at --

10 Q Are you currently the chair of the Gaming --

11 A No. No. I resigned the end of October, first part
12 of November, 2013.

13 Q Okay. And I'm guessing you began that after you left
14 the NIGC?

15 A Yes.

16 Q Okay. Any other employment that I'm forgetting --
17 that I didn't cover?

18 A I am a commissioner on the Judicial Oversight
19 Commission for the Saint Regis Mohawk tribe.

20 Q And that began sometime after you left the NIGC?

21 A Yes.

22 Q Any other employment?

23 A No.

24 Q Did you have a relationship with Anderson Indian Law?

25 A Yes.

1 Q When was that?

2 A I was of counsel with them for maybe a year.

3 Q And was that between any of these that we've talked
4 about or overlap? Can you give me a time frame?

5 A It was after I had established Coleman Indian Law and
6 while -- and that has been ongoing since I've
7 established it. So I think it was about 2012.

8 Q So there was a time -- tell me if I have this
9 right -- that you were of counsel with Anderson and a
10 principal of Coleman?

11 A Yes.

12 Q And a principal of --

13 A Gwe: Nis.

14 Q Gwe: Nis. There was -- and then right now, it's just
15 Coleman and Gwe: Nis; is that right?

16 A Yes.

17 Q Okay. All right. Well, we've been going for an
18 hour, so we can stop for a break, or we can keep
19 going. Whatever you prefer.

20 A Let's keep going until I need --

21 Q Okay. All right.

22 (A discussion was held off the record.)

23 BY MS. McNALLY

24 Q Can you tell me -- let's start with the Department of
25 the Interior, '81 to 1994.

1 A Um-hmm.

2 Q Tell me everything you ever did -- I'm just kidding.

3 We would be here all day.

4 From 1981 to 1994 -- why did you leave
5 in 1994?

6 A I left in 1994 because the National Indian Gaming
7 Commission was just really getting started, and I
8 knew that I -- that it would be a good career move.

9 And it so happened that a good friend
10 of mine who was working at the National Indian Gaming
11 Commission got a job at the Department of the
12 Interior Solicitor's. And so the general counsel
13 needed to quickly replace her, and so I moved over to
14 the NIGC.

15 Q So you essentially --

16 A Yes.

17 Q -- kind of swapped positions?

18 A Yes.

19 Q Okay. All right. Just backing up a second to the
20 Crow Creek work you did.

21 A Um-hmm.

22 Q That didn't relate to gaming --

23 A No.

24 Q -- it sounds like, correct?

25 Okay. All right. In the Office of

1 the Solicitor did you work on gaming issues?

2 A Yes.

3 Q Did you work on management contract issues?

4 A Yes.

5 Q All right. Can you describe the work you did, then?

6 A The Indian Gaming Regulatory Act was passed in 1988,
7 and it said that the NIGC should start doing --
8 reviewing and approving management contracts, but
9 that the Department of the Interior would remain
10 responsible for reviewing and approving them until --
11 until the NIGC got up and running.

12 Basically, the Department of the
13 Interior retained its 25 USC Section 81 authority.
14 Section 81, the courts and then the BIA concluded
15 that management contracts were subject to 81 and to
16 be approved.

17 Q And BIA is the --

18 A Bureau of Indian Affairs.

19 Q Okay.

20 A And so the person who had been primarily responsible
21 for gaming had been -- was Michael Cox, the then --
22 who they -- once they appointed the chair of the
23 Gaming Commission, Michael was hired as the general
24 counsel. And so I took over the Division of Indian
25 Affairs for the responsibility for doing whatever was

1 needed to continue the responsibilities of the -- of
2 the department on gaming issues.

3 And so what I ended up doing is
4 providing advice to the secretary of the interior and
5 to the solicitor of the Department of the Interior,
6 who at that time was really the number two person in
7 the department, that they should start an Indian
8 gaming office and -- excuse me, before that, I and
9 this other woman, this woman from the BIA, we were
10 responsible for doing the Section 81 approvals,
11 reviewing the management contracts, trying to educate
12 the field offices on what they needed to be doing.

13 I recommended the establishment of the
14 Indian gaming office. The secretary established that
15 office, and then they hired someone to run that
16 office. And I worked with her very closely on these
17 issues, including she and I developed the -- the
18 policies for what should be -- what you should look
19 at when you review a management contract, what are
20 the important components, what should be in there.

21 And so she and I actually spent quite
22 a bit of time on that.

23 Q Okay. And who is this person?

24 A That was Hilda Manuel.

25 Q And this was all at the Department of -- at the

1 Department of the Interior?

2 A Yes.

3 Q You said Michael Cox left to go to NIGC?

4 A Yes.

5 Q And prior to his departure, did you do anything
6 relating to Indian gaming in the department?

7 A I did some things, but he was the lead attorney on
8 gaming issues. So it wasn't the kind of full-time
9 job it became after he left.

10 Q Did you do any work relating to management contracts
11 before he left?

12 A I don't remember.

13 Q Okay. When did he leave?

14 A I think 1991. It may have been 1990.

15 Q And then you said you recommended forming an Indian
16 gaming office?

17 A Um-hmm. Yes.

18 Q That's an Indian gaming office within the Department
19 of the Interior?

20 A Yes.

21 Q Was that within the Office of the Solicitor?

22 A No. It -- I believe that they set it up within the
23 Office of the Assistant Secretary of Indian Affairs.

24 Q What was that called, that office?

25 A It was originally called IGMO, Indian Gaming

1 Management Office.

2 Q Okay. And then did it change names at some point?

3 A Yes. I think it's now called Office of Indian
4 Gaming, OIG.

5 Q And how does the Office of Indian Gaming's
6 responsibility relate to the work by the NIGC today?

7 A Well, the NIGC and the OIG have to coordinate their
8 work because -- as it relates to contracts
9 specifically is that the Bureau of Indian Affairs has
10 retained authority over some contracts and of a lot
11 of land issues. And, of course, the NIGC has similar
12 authorities; not exactly the same.

13 And in particular with respect to the
14 contracts, the -- the contracts would sometimes have
15 to be reviewed by -- or approved by the Department of
16 the Interior and sometimes have to be approved by the
17 NIGC. And it wasn't always clear who -- who had to
18 review and approve them.

19 So they coordinated to make sure that
20 that was done in a way -- to make sure that it was
21 done in a way that was efficient.

22 Q And what time period are you talking about?

23 A Well, that really happened in '93, when they really
24 started doing that. I was still at the Department of
25 the Interior, and the NIGC had passed their

1 regulations that included management contract
2 approvals. And the Department of the Interior had
3 been approving these contracts right along, and
4 suddenly the NIGC was responsible for approving them.

5 And what was happening is that
6 contracts that were really subject to NIGC approval
7 were going to region staff or the bureau's
8 headquarters for review and approval, and they
9 wouldn't necessarily get to the NIGC.

10 And so that would -- you know, that
11 would cause a breakdown in the system, especially if
12 there were management contracts where the -- where
13 the department clearly didn't have jurisdiction to
14 make the decisions.

15 Q Okay. Is it fair to say that once the NIGC began
16 reviewing management contracts, that it was the
17 exclusive governmental body to review and approve
18 management contracts?

19 A Yes.

20 Q For the purpose of management?

21 A Right.

22 Q There might have been review for other purposes, but
23 if there was somebody reviewing a management
24 contract, that would be the NIGC?

25 A Yes.

1 Q Okay. And when did that begin?

2 A In '93, I -- I, as the department's representative,
3 met with -- as did, I believe, Hilda; I'm not sure --
4 met with the NIGC, and we talked about the fact that
5 these contracts were falling through the cracks or
6 getting -- not getting reviewed.

7 And so we agreed that all documents
8 would first go to the NIGC for determination of
9 whether they were under their jurisdiction. And then
10 if they weren't -- if they didn't need review and
11 approval by the NIGC, then they would be sent to the
12 Department of the Interior for determination of
13 whether they were under their jurisdiction.

14 Q Okay. That was in '93?

15 A Yes.

16 Q Okay. And at what point did the interior department
17 stop reviewing documents for management contract
18 purposes?

19 A Well, theoretically, in '93, when the regulations
20 became final for the NIGC.

21 Q Okay. And until that point, did you work on
22 management contract issues at the department?

23 A Yes.

24 Q Okay. And you moved to the NIGC straight from the
25 interior department?

1 A Yes.

2 Q In 1994?

3 A Yes.

4 Q Okay. And you stayed there until 2010?

5 A Yes.

6 Q Can you just tell me the job titles you had while you
7 were there?

8 A Senior attorney, associate general counsel, deputy
9 general counsel, and acting general counsel.

10 Associate general counsel and deputy
11 general counsel were essentially the same.

12 Q Okay. How long were you -- when were you -- and then
13 you left as acting general counsel?

14 A I left when I was acting general counsel, yes.

15 Q Okay. How long were you a senior attorney -- or what
16 years were you a senior attorney?

17 A Can I look at my CV?

18 Q Yes, of course.

19 A I have it written down.

20 Q Sure. Let's just make it an exhibit.

21 (A discussion was held off the record.)

22 (Exhibit 1 marked for identification.)

23 BY MS. McNALLY:

24 Q Do you recognize what I've handed you as Exhibit 1?

25 A Yes.

1 Q What is that?

2 (A discussion was held off the record.)

3 BY MS. McNALLY

4 Q Do you recognize what I've marked as Exhibit 1?

5 A Yes.

6 Q And what is that?

7 A That was my -- that's my CV.

8 Q Who prepared this?

9 A I prepared all the way down to "Publications." And
10 then the HRDC office added the list of publications
11 from my website for me.

12 Q And the HRDC office is?

13 A The --

14 Q Your counsel?

15 A Yes.

16 Q Okay. Did you have this -- did you create this
17 document for the purposes of the litigation?

18 A Yes.

19 Q Okay. Did you have a CV before that?

20 A I had a resume.

21 Q Okay. What is on the resume that's not on the CV?

22 A More explanation as to what each of these functions
23 are, references. That's mainly it.

24 Q Okay. What references are on your resume?

25 A What references?

1 Q Yeah. Individuals? Clients?

2 A Individuals, yes.

3 Q Okay. Who is -- who was a reference?

4 A Former acting chair and Former Deputy Assistant
5 Secretary George Skibine; Former Chairman of the
6 Gaming Commission Phil Hogen; Former Commissioner
7 Chuck Choney; and Former Gaming Commission Chair Tad,
8 whose last name I've forgotten.

9 Q Okay.

10 A And Denise Desiderio, legislative -- she's senior --
11 she was senior counsel on the Senate Committee of
12 Indian Affairs.

13 Q Okay. And then, in addition, you said there were
14 descriptions of these -- for example, you had --
15 maybe had descriptions of your prior employment?

16 A Of the -- yes.

17 Q Okay. Are there any other entries that aren't
18 contained in this CV?

19 A Yes. I had other work background before I went to
20 law school that I didn't include.

21 Q What's on your resume that's not on your CV relating
22 to work background?

23 A I was an English teacher and librarian. I -- I ran
24 an experimental social services program for a short
25 time. I don't remember what I called myself in that.

1 And I had one other job with the YMCA that I
2 mentioned. I don't remember what it was.

3 Those are the work.

4 Q Okay. When was the experimental social services
5 program job?

6 A That was -- that was right before I went to law
7 school, so it must have been about '78.

8 Q And was the YMCA job before law school as well?

9 A Yes.

10 Q Okay. Is there anything else that's on your resume
11 that you didn't include on this document that you
12 created for the litigation?

13 A Probably.

14 Q Like what?

15 A I believe I had affiliations on it of organizations
16 that I've been involved in.

17 Q Okay. Any other categories?

18 A Not that I remember.

19 Q What affiliations are on your resume that you didn't
20 include in the CV?

21 A Where I'm bar'ed.

22 Q And where is that?

23 A I'm active in Virginia and inactive in South Dakota.
24 And I'm a member of the Native American Bar
25 Association.

1 Q That's on your resume, but not on the CV?

2 A Yeah.

3 Q Okay. Anything else?

4 A I can't remember anything else. How's that?

5 Q Did you go about the process of taking your resume
6 and making this document, or did someone else do
7 that?

8 A I took the resume and made this document.

9 Q You did that?

10 A Yes.

11 Q And then counsel added the publications?

12 A Yes.

13 Q Okay. How did you decide which things to not copy
14 into this document?

15 A Very simple. I asked my husband. I said, "So what
16 in your mind is a CV as opposed to a resume?"
17 Because I always give out a resume, not a CV. And he
18 says, "It's a one-pager, and it just lists your
19 education and your work experience, and that's really
20 all it is."

21 Q Okay.

22 A And I thought, makes sense to me. So that's what I
23 used.

24 Q Okay. Is there anything else that you recall that
25 you deleted from the resume when you created that CV?

1 A Not that I remember.

2 Q Okay. Looking at the list here, I see there's one
3 topic -- one position we hadn't discussed, which we
4 don't have to spend much time on, I assume, but the
5 Office of the State's Attorney in Deadwood, South
6 Dakota, what kind of work did you do there?

7 A I was interning, and I did criminal cases.

8 Q Criminal cases?

9 Anything relating to gaming?

10 A No.

11 Q I think we got onto this topic by talking about when
12 you were a senior attorney.

13 A Um-hmm. Yes.

14 Q When were you a senior attorney?

15 A So I was -- I started in, I believe, July of 2010 --
16 or '94, as a senior attorney, and -- till '96.

17 And then I believe in '96 I was given
18 the title of associate general counsel, and pretty
19 much at the same time became the acting general
20 counsel.

21 Q Okay. Let's -- and this document doesn't say
22 "associate general counsel."

23 A Right, because I was acting general counsel, too,
24 so...

25 Q Okay. I see.

1 So is it correct to say you were a
2 senior attorney from '94 to '96, associate general
3 counsel and acting general counsel '96 to '98?

4 A Yes.

5 Q And then from '98 to 2002, deputy general counsel and
6 no longer acting general counsel, right?

7 A Right.

8 Q And then you became acting general counsel again from
9 2002 to 2010?

10 A Yes.

11 Q Okay. What were your responsibilities as senior
12 attorney?

13 A I reviewed management contracts, ordinances, advised
14 on -- on notices of violation. Did R contract review
15 to a more limited extent because I was primarily
16 doing management contract review. And at that time
17 we were working on classification of games.

18 The -- I was one of two attorneys in
19 that office, general counsel and myself. We had
20 interns, but basically he and I just did everything.
21 We provided, you know, services, advice to the
22 commission, to the chairman, to the staff. At the
23 time the staff was very small. So it was a very, you
24 know -- you could -- Freedom of Information Act work,
25 anything -- we were in the process of setting up the

1 Gaming Commission and really getting it going, so
2 anything that related to that.

3 Q You mentioned this earlier, and so if you could
4 explain a little bit, what is an R contract? That's
5 the letter "R"?

6 A Yes, that's the letter "R."

7 The -- the NIGC has two -- two ways of
8 handling contracts. One is management contracts,
9 which I don't think they put a name on it, but they
10 might have. And the management contracts went to the
11 Division of Contracts, and they reviewed those for
12 compliance with the Indian Gaming Regulatory Act
13 and -- and would provide feedback.

14 The R contracts went to the Office of
15 General Counsel, and they were reviewed for --
16 essentially for compliance with the Indian Gaming
17 Regulatory Act also, but in a different way, in that
18 this is when the -- when the NIGC had started
19 realizing that companies, investors, consultants,
20 other people had figured out a way to get around the
21 management contract approval process. And so we
22 would encourage parties to submit those contracts for
23 determination of whether or not they were management
24 contracts.

25 Q Are you done? I didn't want to cut you off. Is that

1 the end?

2 A Yeah, essentially.

3 Q Okay. So is it -- another phrase used to describe
4 the R contracts, that sometimes is used the
5 "declination process"? Is that the same thing?

6 A Yes. That's the process that the outside world used.

7 Q Okay.

8 A And we -- and the NIGC adopted it somewhere along the
9 lines, but yes.

10 Q It used to be called -- or at least internally is or
11 was called the R contract process?

12 A Yes.

13 Q And what does "R" stand for?

14 A "R" stands for review.

15 Q And the point of that review was to determine whether
16 or not a document was a management contract that
17 should go and get approved by the Division of
18 Contracts; is that right?

19 A Not -- not -- not usually.

20 Q Okay.

21 A Usually people who knew that they had a management
22 contract submitted it to the Division of Contracts
23 for approval as a management contract.

24 Q Okay.

25 A The R contract review was -- had a lot of -- there

1 were a lot of reasons for it; one was that the -- the
2 Indian Gaming Regulatory Act is intended to protect
3 tribes, is intended to keep organized crime out, make
4 sure tribes are the primary beneficiaries of gaming.
5 And the -- there were some people who were trying to
6 get around the contract approval process by just not
7 submitting them for approval.

8 And so initially, the department --
9 the NIGC was actually asking people to submit it or
10 calling the BIA and saying, "Are you getting these
11 contracts? Remember, you're supposed to send them to
12 us first."

13 And then as things went along, more
14 people started just submitting them as protection not
15 just for their tribal clients, but also for their
16 business clients.

17 Q I think actually we're going to spend a bit of time
18 on that process in a little while, so I just want to
19 get -- in the '94 to '96 period when you were senior
20 attorney --

21 A Um-hmm.

22 Q -- it was you and the general counsel were the only
23 people in the legal department at NIGC; is that
24 right?

25 A Yeah, we had -- well --

1 Q The only employee attorneys; is that right?

2 A Well, there was one young woman who had been an
3 intern who worked for us for a while -- I don't
4 really remember the dates -- who was, you know, an
5 attorney.

6 Q And Mr. Cox was the general counsel at the time?

7 A Yes.

8 Q Okay. And the Division of Contracts was somewhere
9 else at the time? Were there employees in the
10 Division of Contracts in that time period?

11 A It wasn't until about '96 that the office actually --
12 the NIGC actually established divisions.

13 Q Okay.

14 A There was commissioners; there was the general
15 counsel; there was Mr. Stuckwisch, whose title I
16 think was executive director; and then there were the
17 rest of us.

18 I reported directly to the general
19 counsel, and the interns -- the legal interns
20 reported directly to the general counsel. Everybody
21 else reported directly to Mr. Stuckwisch.

22 Q Who were the "all else" and what kind of work did
23 they do?

24 A Alan Fedman was an enforcement person; Elaine Trimble
25 was an -- and Joe Dutz were management contract

1 people. We had two or three people who were "keep
2 everything running" people.

3 Q Like an administrative-type --

4 A Administrative and computer and -- the Department of
5 Interior did our personnel work, and so the paperwork
6 had to be handled --

7 Q Sure, sure.

8 A -- so there was a personnel person.

9 Q Okay. Anyone else?

10 A I imagine, but I --

11 Q I mean, any other kind of categories of people?

12 A Environmental. There was a person who did
13 environmental review.

14 Q Okay.

15 A There was a person who was -- who did congressional
16 liaison and FOIA work.

17 Q Okay. And those people all reported to the executive
18 director?

19 A Yes.

20 Q And this is in '94 to '96 you're talking about?

21 A Yes.

22 Q Okay. You had people -- Trimble and Dutz, did you
23 say?

24 A Yes.

25 Q Did management contract review -- does that suggest

1 that you weren't doing management contract review at
2 that time?

3 A No. I was doing it also, but they did it first, and
4 then I would review their review.

5 Q You reviewed their work?

6 A I reviewed their work, and they would ask me legal
7 questions and...

8 Q Did they do legal review?

9 A What they were doing is they were reviewing contracts
10 for compliance with the Indian Gaming Regulatory Act,
11 which has a number of items that need to be -- need
12 to be in a contract to be approvable.

13 They reviewed the deal as a whole.

14 Q Okay.

15 A They -- they had -- someone I forgot to mention, they
16 had people who did background investigations on
17 the -- the people who had to be backgrounded as part
18 of the management contract approval process.

19 And, of course, because this was --
20 this was a new agency, they were also in the process
21 of developing policies and procedures.

22 Q And then after they would review management contracts
23 for compliance with IGRA, you would review their
24 conclusions, or would you do a different kind of a
25 review?

1 A Well, certainly, in the first years I just reviewed
2 absolutely everything because we were so new at this,
3 and that we wanted to make sure that we were all on
4 the same page and were doing the same thing and
5 understood what was going on and could make changes
6 to how we were approaching things.

7 So later, as it became a Division of
8 Contracts and it became more specialized, and they
9 became more experienced and the systems were more in
10 place. You know, they -- they carried a lot more of
11 the burden.

12 Q Um-hmm. So when they would review the contracts for
13 compliance with IGRA, did you review their work, or
14 did you do a separate kind of review?

15 A I would review their work. And if they had specific
16 legal questions, I would answer those.

17 Q Okay. Did your job responsibilities change when you
18 became associate general counsel and acting general
19 counsel in 1996?

20 A Well, we started hiring more people. We started
21 developing our processes.

22 You know, it was an ever-growing
23 agency, so there was always something new going on.

24 Q Did your job responsibilities with respect to R
25 contracts change when you became associate general

1 counsel and acting general counsel in 1996?

2 A Well, Michael Cox left about that time, yes, and so I
3 became the lead on R contract review.

4 Q What does that mean, to be the lead?

5 A I was the one that signed the letters.

6 Q Okay.

7 A So I either wrote the letters or somebody else wrote
8 them, and I reviewed them to make sure that I agreed
9 with them before I signed them.

10 Q Okay. And when we talk about the letters, those are
11 the letters relating to the R contracts?

12 A The declination letters, yes.

13 Q Okay. And is the reason you became associate general
14 counsel and acting general counsel because he left?

15 A Yes.

16 Q Okay. Did your job responsibilities change with
17 respect to management contracts?

18 A Well, not right away. I continued to review
19 management contracts.

20 Q Did they change at some point?

21 A I became -- over time, over the course of -- from
22 '96 to 2010, I became more of the supervisor and
23 didn't spend as much time on the management
24 contracts, per se.

25 Q When did the Division of Contracts come about?

1 A I think it was in '96.

2 Just as I became associate counsel,
3 basically divisions were established, supervisors
4 were appointed. And so there was a Division of
5 Contracts, Division of Enforcement, Division of
6 Administration.

7 The background investigation people, I
8 think, were a section within the Division of
9 Contracts, if I remember right.

10 Q And was the R contract process still within the
11 Office of the General Counsel?

12 A Yes.

13 Q Not within the Division of Contracts?

14 A No.

15 Q Okay. Sorry, that -- I asked that in a way to lead
16 to an unclear record.

17 Was the R contract process in the
18 Division of Contracts?

19 It was the way I phrased it. When you
20 said, "no," it wasn't clear exactly what you were
21 answering --

22 A Okay.

23 Q -- so I'm just going to ask it in a nonnegative way.

24 Was the R contract process part of the
25 Division of Contracts?

1 A Assuming what we're saying is that -- the part of the
2 R contract process that was completely separate from
3 the management contracts, that was in the Office of
4 General Counsel.

5 Q The declination process?

6 A Yes.

7 Q Okay. And was there part of that process that was
8 within the Division of Contracts?

9 A Yeah. The Division of Contracts, when they would get
10 a management contract, would also be looking at all
11 of the additional contracts that would be submitted
12 with the management contract for a determination of
13 whether or not there was management in those
14 contracts and whether or not they should be subject
15 to approval.

16 Q Okay. But if an organization submitted a deal and
17 said, "We would like you to decide whether this is a
18 management contract or not," would that go to the
19 Division of Contracts?

20 A No. That would go to the Office of General Counsel.

21 Q Okay. Now, in this time period you said that you
22 began -- you would sign the letters; sometimes you
23 would write them, and sometimes someone else would
24 write them.

25 A Um-hmm.

1 Q Who was that someone else who would write them?

2 A It would almost always be an attorney in the Office
3 of General Counsel.

4 Q Okay. Who would those attorneys -- what would the
5 job title be of that person?

6 A They had various titles. They could be a staff
7 attorney; they could be a senior attorney; or at some
8 point, I made two people associate general counsel.

9 Q Okay. How many people were in the Office of the
10 General Counsel from '96 to '98?

11 A I don't know.

12 Q How many lawyers worked in the Office of the General
13 Counsel in that time period?

14 A I don't know.

15 Q Was it under five?

16 A That would be a guess. It wasn't as -- by the time I
17 left, it was 20.

18 Q Okay.

19 A It grew slowly over the years. I don't know how many
20 were in there between '96 and '98. I just don't
21 know.

22 Q When you started in '96, the Office of the General --
23 when you started in '94, it was you -- there were
24 two, right?

25 A Yes.

1 Q And then by the time you left in 2010, it was 20?

2 A Twenty people.

3 Q Twenty, right. Lawyers?

4 A No.

5 Q Okay. How many lawyers?

6 A Approximately 15 or 16.

7 Q How would you decide which letters you would write
8 and which letters you would have someone else write?

9 A Well, that would be based usually just on workload
10 and -- and how fast something needed to go out and
11 whether I was available or whether someone else was
12 available.

13 Q Okay. And did your job responsibilities with respect
14 to those letters change when you became deputy
15 general counsel and no longer acting general counsel
16 in 1998?

17 A No, not really.

18 Q Other than your job title, what did change in that
19 time period?

20 A When I was deputy general counsel, then we had a --
21 we had two general counsels during that time.

22 Q All right. Were you considered to be named general
23 counsel in the 1996 to '98 time period?

24 A What do you mean?

25 Q When you were acting general counsel, were you ever

1 considered to be named as general counsel?

2 A Do you mean was I ever asked if I wanted to be, or
3 did someone think maybe I should be? Or what's your
4 question?

5 Q Okay. Were you ever asked if you wanted to be?

6 A Yes.

7 Q And what did you say?

8 A I said no.

9 Q Why did you say no?

10 A Because the general counsel position is a
11 high-profile, controversial position. And at the
12 time, I was still a long way from being able to leave
13 the government with a pension, and I didn't want to
14 have to deal with it.

15 Q When you were in that position, even as acting
16 general counsel, was it a position of controversy
17 then?

18 A Of course.

19 Q Okay. You just did not want to have that as a
20 permanent job? Is that why you said no?

21 A At that time, yep. Yes.

22 Q Okay. And what was the controversy about at that
23 time? Do you recall?

24 A This is Indian gaming. Indian gaming is
25 controversial. Just about everything we did was

1 controversial, whether we classified a game as
2 Class II or as Class III, one side or the other
3 didn't like it. If we said a particular piece of
4 land could be gamed on or not, one side or the other
5 didn't like it.

6 We were starting into the enforcement
7 process more, which, you know, is a black eye on the
8 people who are being enforced against.

9 Q Um-hmm.

10 A I had to work with the Department of Justice,
11 Department of Interior, the U.S. attorneys.

12 We were an independent agency trying
13 to do what we thought was right. That didn't
14 necessarily always coincide with what other people
15 thought was right.

16 It was a controversial job.

17 Q Got it. You must have been relieved in 1998 when
18 someone else became the general counsel?

19 A Relieved. I don't know that --

20 Q You don't need to answer that. That's fine.

21 Tell me about how your job changed
22 when you became deputy general counsel in 1998.

23 A It didn't change a lot.

24 Q Okay.

25 MR. TUREK: Off the record.

1 (A discussion was held off the record.)

2 (A lunch recess was taken at 11:54 a.m.)

3 (Back on the record at 12:57 p.m.)

4 MS. McNALLY: Back on the record.

5 BY MS. McNALLY

6 Q Ms. Coleman, did anything occur to you during the
7 break that you needed to correct that you testified
8 to this morning?

9 A No.

10 Q Okay. Now moving -- we were up to the deputy general
11 counsel time period.

12 A Okay.

13 Q I know that gave you a sense of hopelessness when I
14 just said what I said, but from there until the time
15 period you left the NIGC, did your role with respect
16 to review of management contracts or R contracts
17 change?

18 A No.

19 Q Okay. And then after you left the NIGC -- can you
20 tell me why you left?

21 A It was a good time to leave.

22 Q What made it a good time to leave?

23 A There was a new administration coming in; there was
24 likely to be a new general counsel.

25 I had already been general counsel for

1 a very long time. It was a good time.

2 Q When you were in your second round as acting general
3 counsel, did you at that point want the official job?

4 A Sometimes.

5 Q Okay. Were you approached to consider taking the
6 general counsel job?

7 A It was discussed.

8 Q Who discussed it?

9 A The chairman.

10 Q Who was that?

11 A At the time, the chairman was Phil Hogen.

12 Q Is that your counsel's father?

13 A Yes.

14 Q And did you express an interest in the job?

15 A Yes.

16 Q And do you have any understanding about why you did
17 not -- you were not named general counsel at any
18 time?

19 A We -- no, I'd say. I would -- I would only be
20 guessing, and I'm not going to guess.

21 Q Okay. What are some possible reasons that you
22 believe could be the reason why you weren't named
23 general counsel?

24 MS. HOGEN MOLINE: I'll just note that that
25 calls for speculation.

1 MS. McNALLY: Okay.

2 THE WITNESS: Truly.

3 BY MS. McNALLY

4 Q Go ahead. You can speculate.

5 A There are a couple powerful people who didn't really
6 want me in that job.

7 Q Who are those people?

8 A I'm not going to speculate. I just won't do it.

9 I mean, there's -- there's always
10 some. And, you know, who they -- I know that in that
11 kind of job you're just in a difficult situation.
12 You're general counsel, as I mentioned, it's a
13 high-profile position, and there will always be
14 people who would rather you get replaced with
15 somebody they like.

16 Q All right. But sitting here today, you would have to
17 completely speculate to guess who didn't want you in
18 the job?

19 A Yes.

20 Q Did any of the reasons that individuals didn't want
21 you in the job relate to your job performance, to
22 your knowledge?

23 A No.

24 Q When you -- after you left, you started, we talked
25 earlier, Gwe: Nis Consulting?

1 A Gwe: Nis, yes.

2 Q I apologize if I'm not pronouncing it correctly.

3 What does the origin of that name
4 mean?

5 A It's Onondaga.

6 Q What does it mean?

7 A It means "pennies or small change."

8 Q Ah, clever.

9 Okay. What kind of work does your
10 consulting firm do?

11 A Well -- let's see. What did I do.

12 I didn't do -- I did some work early
13 on, and then essentially haven't done any work using
14 that firm for a couple of years.

15 My husband is a partner, and he uses
16 it.

17 Q Okay. So most of the work you do now is through
18 Coleman Indian Law?

19 A Yes.

20 Q Is there anyone other than your husband working
21 Gwe: Nis Consulting?

22 A No.

23 Q Is that work done on behalf of tribes?

24 A He does work on behalf of Johns Hopkins, the Boys and
25 Girls Clubs, tribes.

1 Q What kind of consulting?

2 A Mainly it's -- hmm. It's liaison with -- liaising
3 with organizations and colleges and --

4 Q Just what topics? What kind of work is it?

5 A Well, Boys & Girls Club would be Boys & Girls Club
6 stuff.

7 Johns Hopkins would be like --

8 Q I mean, consulting with -- what kind of consulting is
9 what I'm trying to ask.

10 A Well, it's a variety.

11 Q Okay.

12 A He has an Indian health service and education
13 background. And so --

14 Q I'm sorry to interrupt.

15 I mean, when you were doing work, what
16 was the work you -- what kind of consulting work did
17 you do with that organization?

18 A I did some expert work for a tribe. I can't even
19 think of what else.

20 Q What kind of expert work?

21 A If I remember right, it was managing R -- it was
22 reviewing documents -- or reviewing documents on
23 whether they're management.

24 Q So in your work for Gwe: Nis -- let me just make sure

25 I understand -- you did some expert consulting on

1 whether certain contracts were management contracts?

2 A Yeah.

3 Q Okay. And was that for purposes of litigation or
4 something else?

5 A I believe so.

6 Q You believe it was for litigation?

7 A Well, I was -- yeah. I mean, I -- well --

8 Q Was there a lawsuit when you were being an expert --

9 A I don't remember that.

10 Q Okay. You weren't deposed?

11 A No.

12 Q And then in Coleman Indian Law, what kind -- how much
13 of the work you do there is for tribes?

14 A Most of it's for tribes.

15 Q Okay. And can you just kind of generally describe
16 the nature of your practice?

17 A Indian law.

18 Q Okay. Do you do litigation matters?

19 A I assist on litigation matters. I --

20 Q What does that mean?

21 A Well, I am -- I have done Indian law for 33 years.
22 And so I have broad knowledge in it, and I also know
23 people who are -- you know, that are the right
24 contacts to make when you're trying to work on a
25 case.

1 And so I'll do briefs, give ideas,
2 tell them how to get through the process, who to talk
3 to at DOJ. Those kinds of things.

4 Q Okay. Are you counsel of record in any litigation
5 matters?

6 A No.

7 Q Okay. Have you served as an expert in your -- when
8 you've been working through Coleman Indian Law, other
9 than in this matter?

10 A No -- well --

11 Q Giving expert opinion?

12 A No, I don't think so.

13 Q Okay. Have you ever testified as an expert in --
14 through Coleman Indian Law -- and I'm not trying to
15 trick you with this, but I noticed on your website
16 that it says you've testified as an expert in cases,
17 plural, so I'm trying to understand that.

18 A Well, testimony includes affidavits.

19 Q Um-hmm.

20 A And so that's the reference.

21 Q And it says "cases." So what case -- are you talking
22 about this case --

23 A Yes.

24 Q -- or other cases as well?

25 A Yes, this case.

1 Q Any other cases?

2 A No.

3 Q Okay. All right. And then you do some work with
4 Internet gaming?

5 A Primarily I do education.

6 Q Do you represent any, like, gaming alliances, any
7 work like that?

8 A No.

9 Q Do you do lobbying work?

10 A No.

11 Q You know, I think we talked about this earlier:

12 You're compensated on an hourly basis for this case?

13 A Yes.

14 Q And what's your rate?

15 A \$500 an hour.

16 Q Is that the rate you charge in other litigation
17 matters where you're assisting clients?

18 A Not always, no.

19 Q Okay. What's the spectrum of rates you charge?

20 A I've charged everywhere from 200 to 500.

21 Q Okay. Is there any other payment component in this
22 case?

23 A No.

24 Q Is there any flat fee component?

25 A No.

1 Q Any success fee component?

2 A No.

3 Q Now, let's turn to the opinions that you're providing
4 in this case.

5 In preparing those opinions, what
6 materials did you review?

7 And if you want to refer just
8 generally to the ones we talked about this morning,
9 we kind of covered those. And, in addition, what
10 other materials did you review in consideration -- in
11 order to prepare for today?

12 A So everything that was on the closing index that was
13 provided to you, which was all of the basic
14 documents: the security agreement, tribal agreement,
15 limited offering memo, the bond agreement -- or bond
16 resolution. Those things.

17 Q Um-hmm.

18 A And then the specific ones I reviewed for purposes of
19 drafting my affidavit are the ones that are listed in
20 the affidavit.

21 Q Right.

22 A And, in addition, as I mentioned, I looked at the
23 NOVs. I looked at the court cases. I looked at the
24 declination letters.

25 Q So those are the things that we discussed at the

1 beginning today?

2 A Yeah.

3 Q Okay. Were there any other legal treatises or
4 sources of information that you reviewed?

5 A No.

6 Q Okay. Did you interview anyone?

7 A Interview anyone.

8 Q Um-hmm.

9 A No.

10 Q And did you consult with anyone, other than counsel,
11 in preparing your declaration?

12 A No.

13 Are we done with this?

14 Q Yeah, just put it to the side.

15 (Exhibit 2 marked for identification.)

16 BY MS. McNALLY:

17 Q I'm going to hand you what I've marked as Exhibit 2.

18 A Okay.

19 Q Can you tell me what that is?

20 A That's the affidavit of Penny J. Coleman.

21 Q And does that appear to be the affidavit that was
22 submitted -- that was filed on June 13th in this
23 matter?

24 A Yes. June 8th.

25 Q And is that your signature on page 16?

1 A Yes.

2 Q And you signed it on June 8th, 2003, in front of a
3 notary, right?

4 A Yes.

5 Q Did you prepare this document?

6 A Yes, I did.

7 Q And is this a full copy of your declaration?

8 A It appears to be.

9 Q I think you said this morning that there was
10 something in this declaration you thought was
11 inaccurate. And I'm not trying to put words in your
12 mouth, but I thought I heard you say that. Is that
13 right?

14 A Yes.

15 Q Okay. Can you tell me what that is?

16 A Fifty-six, I believe it is. Yeah, the bond purchase
17 agreement.

18 Q Okay.

19 A In reviewing that section, I looked at Section 9 and
20 realized that that wasn't really the right section to
21 be looking at because Section 9 is just a list of
22 what counsel's going to provide, rather than a --
23 rather than a lien that's being placed pursuant to
24 that section.

25 And so I looked at the bond purchase

1 agreement again and -- let me find it -- to see if I
2 should still look at it, and I determined that really
3 a better example of what is pertinent here -- let's
4 see. This is under transaction documents --

5 (Reporter clarification.)

6 THE WITNESS: I'm sorry.

7 This section, No. 56, is under the
8 heading: "The Transaction Documents are Individually
9 Management Contracts Subject to NIGC Approval,"
10 and --

11 BY MS. McNALLY

12 Q That's -- you're reading from page 12, that heading?

13 A I'm reading from page 12, the bold headline.

14 And I looked at page 5 of the bond
15 purchase agreement, the Section 6: "Corporations,
16 Representations, and Warranties: The corporation
17 makes the following representations and warranties."
18 And then it lists what essentially the corporation
19 guarantees through its warranties.

20 And it says that the indenture is
21 enforceable in accordance with its terms. The
22 agreement is enforceable in accordance with its
23 terms. Security agreement is enforceable in
24 accordance with its terms. The bonds will constitute
25 legal and valid binding obligations and will be

1 entitled to the benefit and security of the
2 indenture. The security agreement and the tribal
3 agreement will be enforceable.

4 Essentially, I would say that what --
5 Section 6, you know, those sections of that -- of the
6 bond purchase agreement, essentially incorporate
7 these agreements, and by doing so, incorporate the
8 default remedies and the other authorities that
9 are -- include management.

10 And so I would say that if given the
11 opportunity, I would strike the "See Section 9" and
12 say "See Section 6."

13 Q See Section 6?

14 A Yeah.

15 Q Is there anything else that you think is inaccurate
16 in your affidavit?

17 A Not inaccurate.

18 Q All right. Now, the first -- if you start -- the
19 first big heading in your affidavit is the "NIGC
20 Declination Process," and it begins on page 3.

21 A Yes.

22 Q I want to ask a little bit about the NIGC declination
23 process.

24 A Okay.

25 Q That's the R contract program that we talked about

1 earlier?

2 A Yes.

3 Q Okay. When the Office of General Counsel sends those
4 letters --

5 A Um-hmm.

6 Q -- what oversight, if any, is provided by the
7 commission members?

8 A General counsel responds directly to the chairman.
9 He is the head of the staff. And so to the extent
10 that there is, you know, responsibility to keep him
11 informed of what the General Counsel's Office is
12 doing and how they're approaching things, he's the
13 one that oversees.

14 Q Does the chair review the letters?

15 A Very rarely.

16 Q What would require -- why would that ever happen?

17 A One example of why that would happen is if there was
18 a request to have a decision of the commission that
19 might be subject to appeal; or they might ask the
20 commission to issue an agency decision so that it
21 could be appealed.

22 Q But for your standard letters, those would not be
23 reviewed by the direct -- the commissioners, right?

24 I'll ask it again.

25 A Yes.

1 Q Were -- as a general matter, were the declination
2 letters reviewed by any commissioners?

3 A No.

4 Q Okay, thanks.

5 And what training was provided to the
6 individuals drafting the letters about what would be
7 included in them?

8 A Well, of course, with any new attorneys, we sat down
9 and talked to them about it, told them how we had
10 been approaching it, showed them the letters.

11 In fact, the director of contracts was
12 fairly involved in, you know, just contract review
13 and helping teach attorneys how to do it.

14 Q Who was that did you say? The director of contracts?

15 A Yeah.

16 And I had -- as time went on and we
17 got bigger, then I had a deputy -- or -- yeah,
18 associate general counsel, whatever his title was,
19 and he was actively, you know, reviewing the cases.

20 Anybody who doesn't have a background
21 in that, in this, we would -- either I or he would go
22 through the entire contract after they prepared the
23 draft and said -- and look at it and say, "Okay," you
24 know, "I don't agree with this because of this
25 reason; I agree with this because of this reason."

1 We were very proactive that way.

2 The other thing, too, is that I always
3 assigned mentors for each attorney so that they would
4 have somebody to go talk to.

5 Q Okay.

6 A And then some of the attorneys we brought in already
7 had -- were outside counsel and had experience. And
8 so that --

9 Q The director of contracts, is that someone in the
10 Division of Contracts? Who is --

11 A Yeah. Yes.

12 Q I thought we said -- I thought when we talked earlier
13 today that the Division of Contracts wasn't involved
14 in declination.

15 A Well, they're not the ones who sign the letters, but
16 because they do management contract review, they
17 have, you know, a group of contracts that come in
18 with every contract. And so there's often
19 declination letters requested for those contracts.

20 Q Okay.

21 A And so, you know, we worked closely together to get
22 those letters out.

23 Q So it sounds like that -- would it be fair to say
24 that the training for people who were writing the
25 letters was largely one-on-one --

1 A Yes.

2 Q -- on-the-job training?

3 A Yeah.

4 Q And was it -- it wasn't a textbook, in other words,
5 right, obviously?

6 A No. There was no textbook.

7 Q Were there any regulations that listed the particular
8 elements that you would look for in doing the
9 declination process?

10 A There's 94.5, which is a bulletin. And we had
11 in-house memoranda on the kinds of things to look
12 for.

13 Q So, no, there were no reg- -- I'm talking about --

14 A No regulation.

15 Q Okay. And that's NIGC bulletin 94-5?

16 A Yes.

17 Q And that talks about consulting agreements?

18 A Yes.

19 Q And then you said there were in-house memoranda?

20 A Yes.

21 Q Were those published anywhere?

22 A No.

23 Q Were they subject to any review from outside of the
24 agency?

25 A No.

1 Q Is it fair to call it an "agency," the commission an
2 agency? I don't want to get the terminology wrong.

3 A We used "agency."

4 Q Okay. So the internal memoranda, were they -- I
5 think you just said they were not published outside
6 the agency, right?

7 A (Witness nods head.)

8 Q Okay. In your declaration, if we look at paragraph
9 16, you talk about ordinary and customary practice.

10 A Um-hmm.

11 Q What's the source of the ordinary and customary
12 practice that you're talking about?

13 A There's the two bulletins, 93.3 and 94.5. And we
14 work very closely with all tribes and companies
15 and -- you know, who -- if you want to be sure that
16 these are not management contracts, to get some -- to
17 have some reliance, then you need to submit them.

18 Q Okay. Was that -- the ordinary and customary
19 practice wasn't created subject to any formal rule
20 making?

21 A No.

22 Q And it would have been involved -- it sounds like,
23 from what you're saying, that those practices would
24 have evolved over time?

25 A Yes.

1 Q Okay. And they're pretty context-dependent?

2 A Pretty what?

3 Q Context-dependent?

4 A If you mean that they're very case by case?

5 Q Yeah.

6 A Yes.

7 Q Okay. All right. And what's the difference between
8 "policy" and "custom and practice," when you use
9 those terms?

10 A Custom and practice is this is what the -- this is
11 what the agency was doing.

12 Policy was agency was going to do it
13 for tribes and for companies, rather than issue
14 NO- -- notices of violation.

15 Q I'm not sure I understand what that means, the policy
16 part. Maybe I just couldn't hear what you said.

17 A The decision to use agency resources to review these
18 contracts is a policy developed to help tribes, help
19 companies become compliant. And it's a way of
20 preventing -- or reducing the need to do enforcement
21 actions.

22 Q Okay. And that's different from -- "custom and
23 practice" is a term that kind of just describes on
24 the ground what was happening?

25 A Yes.

1 Q Okay. If you look in paragraph 14, it says, "A
2 typical set of agreements submitted to the NIGC for
3 review." Do you see that language?

4 A Yes.

5 Q And just to back up for a minute, these are all your
6 words in this affidavit, right?

7 A Yes.

8 Q Okay. So when you say "a typical set," what do you
9 mean by that?

10 A Well, here, we're referring to the management
11 contract approval process.

12 So a tribe -- you know, tribes and
13 companies were expected, if they were submitting a
14 contract, management contract, to submit all the
15 agreements that really made up the deal. And these
16 three were usually the core of that deal.

17 There would often be a lot more
18 contracts.

19 Q Okay. So at this point in the affidavit you're
20 talking about -- and I guess it's right in paragraph
21 13, too -- that you're talking about management
22 contract approval --

23 A Yes.

24 Q -- as opposed to declination?

25 A Yes.

1 Q Okay.

2 Okay. And the second half of that
3 paragraph talks about the parties are careful to
4 assert that documents can stand alone -- the
5 collateral documents can stand alone -- I'm sorry.
6 I'm not going to summarize it.

7 "The parties are seeking" -- "seeking
8 contract approval are careful to assure that the loan
9 and developing agreements can stand alone and not
10 require management and gaming" -- sorry, I'm not
11 reading that quote right.

12 Just read that paragraph 14 where
13 you're talking about what the parties are careful to
14 do, okay?

15 A Okay. Yes.

16 Q All right. What's your basis for that?

17 A In practice, while there are sometimes parties who
18 will want the management contract and everything else
19 all decided and agreed to at the same time, there
20 were many more who would want the management contract
21 to be approved but that wasn't the first thing that
22 they felt they needed to do. They wanted to go ahead
23 and do the loan, do the development agreement, you
24 know, do the environmental review, all the things
25 that are precursors to opening a casino.

1 And the only way to do that is to make
2 sure that the contracts are not interdependent and
3 don't contain management.

4 Q Okay. Did that point have any practical impact on
5 the review process?

6 A Pardon?

7 Q What you're saying here about what the parties would
8 do or not do, did that have an impact on the decision
9 that the NIGC would make, your decision-making
10 process?

11 A I don't understand your question.

12 Q When the NIGC was evaluating the contracts --

13 A Um-hmm.

14 Q -- did the parties' intentions here make a difference
15 in the evaluation?

16 A Well, in -- not in the ultimate outcome as a general
17 matter.

18 Q If you'd look at 25.

19 A Okay.

20 Q Twenty-five talks about "The contracts can be so
21 inextricably linked that the contracts taken together
22 constitute a management contract."

23 A Um-hmm.

24 Q And then at the end you cite to a letter to Principal
25 Chief Jones of the Eastern Band of Cherokee Indians.

1 Is that your source for that position?

2 A It's a -- it's an example of how the NIGC approached
3 this.

4 Q Okay. What was the legal basis for that position?

5 A What's the legal basis for it?

6 Q Right. For example, is there a regulation that
7 states this?

8 A No.

9 Q Okay. Is there a statute?

10 A No.

11 Q Okay. So what's the legal basis?

12 A Well, I'm not here to give legal advice.

13 Q Did you have a legal basis for this position at the
14 NIGC?

15 A I believe that the commission took -- looked at each
16 contract separately, and using the bulletins, the
17 advice that had been given before, the internal
18 documents that describe, you know, what consists --
19 what consists of management, and then later, you
20 know, final agency decisions that say what
21 constitutes management, they were -- they were
22 looking to see if the two, taken together, were so --
23 so much a -- the same action, the same contract, that
24 they had to be treated together.

25 Q Okay. Anything -- any other -- anything outside of

1 the commission's own view as a legal basis for that
2 opinion?

3 A Well, certainly, as time went on, there were court
4 cases who discussed these kinds of things.

5 I don't know if there's one that --
6 that describes that specific issue. You know, in the
7 next paragraph it does in a more tangential way.

8 Q Okay. I notice in paragraph 27 you said that the
9 NIGC is still -- no apparent change, and they
10 continue to agree generally with the decision of
11 Wells Fargo?

12 A Um-hmm. Yes.

13 Q That was language that also appeared in letters you
14 signed, right --

15 A Yes.

16 Q -- "I agree generally with the decision"?

17 A Yes.

18 Q What does the "generally" mean -- reference?

19 A It's a word that makes clear that -- you know, that
20 each one of these are fact-specific and, you know,
21 that you just can't take something from one court
22 case and say, well, then this decides everything.
23 You have to look at each -- each set of files, each
24 set of contracts.

25 Q Were there aspects of that opinion that you did not

1 agree with?

2 A That I did not agree with?

3 Q Um-hmm.

4 A Not that I remember.

5 Q Okay. Are you aware of aspects of that opinion that
6 the NIGC did not agree with?

7 A Not that I know of.

8 Q Okay. Let's look at page 9 -- oh, I'm sorry. Yeah,
9 I meant page 9 at the bottom. At the top it says
10 page 8.

11 But in between paragraphs 30 and 31,
12 is this your opinion that contracts are interrelated
13 and should be treated as one transaction?

14 A Yes.

15 Q Okay. Are you saying that as a legal matter they
16 should be treated as one transaction?

17 A I'm saying that as an expert in this area.

18 Q I know that's your role, but are you saying that as a
19 legal matter?

20 A I don't understand the question.

21 Q I'm trying to understand what you mean by "They
22 should be treated as one transaction."

23 Do you mean under the law they should
24 be treated as one transaction?

25 A I'm saying that for purposes of the Indian Gaming

1 Regulatory Act and for purposes of acquiring approval
2 by the NIGC, the NIGC would consider them to be one
3 trans- -- I believe that the NIGC would consider them
4 to be one transaction.

5 Q Okay. So am I correct in saying you're not saying
6 that as a matter of law they should be treated as one
7 transaction. You're instead saying it's your opinion
8 the NIGC would treat them as one transaction?

9 A It is my opinion that the NIGC would treat them as
10 one transaction.

11 Q Okay. If you look at paragraph 31, "The following
12 documents repeatedly reference the other agreements,
13 and substantive provisions are provisions" -- "are
14 dependent upon provisions in other agreements."

15 Can you describe what testing you did
16 to determine things are substantive or not
17 substantive?

18 A No.

19 Q Did you do anything other than read the documents?

20 A I read the documents.

21 Q Okay. And when you say they "repeatedly reference,"
22 is that kind of chronicled in the following
23 paragraph?

24 A As I mentioned earlier, it's not everything, but it
25 was a good example of repeated reference to other

1 agreements.

2 Q Okay. So is it fair to say that under your analysis,
3 you can look at the documents and they're clear on
4 their face that they are -- that they are so
5 intertwined they should be viewed as one transaction?

6 A Yes.

7 Q Okay. Later on, for example in 42, you talk about
8 these things being inextricably linked. Not just
9 that they're linked, but they're inextricably linked.
10 What did you do to determine that
11 those links are inextricable?

12 A Where is "inextricable"? I'm trying to find it.
13 What number?

14 MR. TUREK: Page 12.

15 BY MS. McNALLY:

16 Q Paragraph 42 is the one I was --

17 A Okay. It's actually 41.

18 Q Okay.

19 A But --

20 Q Both of them. Okay?

21 A Forty-two really explains that.

22 Q Okay.

23 A They're dependent upon each other. None functions
24 without the other; the trust indenture's void; the
25 bonds can't be issued without a trustee; the

1 corporation could not borrow without the trustee.

2 Q Right, right. I understand that you kind of
3 summarized them, but I'm asking -- I'm asking a
4 slightly different question.

5 Did you do anything to try and
6 evaluate whether any of these things could be
7 de-linked, or did you read them and say based on --
8 it's so transparent in the documents that they can't
9 be -- that they're inextricably linked?

10 A Well, it's my understanding that you can't de-link a
11 void document.

12 These documents have -- are -- if
13 they're management contracts, they're either subject
14 to approval or not. And so you've got to look at
15 them -- in a particular case like this, you have to
16 look at them altogether because they're -- the
17 provisions from one document to the other are the
18 same. They rely on each other for -- for, you know,
19 most of the fundamental aspects of the contract.

20 Q All right. And I don't mean de-linked because of
21 voidness. You don't just say "they're interlinked."

22 You repeatedly say "They're inextricably
23 interlinked."

24 So in coming to that, you said the
25 word "inextricably." I'm wondering what you did to

1 reach that conclusion. Or did you just simply look
2 at the language?

3 A I looked at the language of the documents. I also
4 was aware that the trust indenture had been declared
5 void and that most of the documents rely on the trust
6 invention -- indenture.

7 Q Okay. And is that what you mean in paragraph 43
8 where you say that "Indenture is central"?

9 A On page what?

10 Q Paragraph 43, "central to the transaction"?

11 A Yes.

12 Q Okay.

13 A Well, I -- I guess I'm not real sure what you mean,
14 but the indenture -- the indenture is -- everything
15 flows from the indenture. And that's how I -- what I
16 meant -- what I meant by "central to the
17 transaction."

18 Q That's exactly what I was asking. So okay.

19 When you say it's "central to the
20 transaction," you meant everything flows from the
21 indenture?

22 A Essentially, yeah.

23 Q Okay. Was there something wrong with what I said so
24 that you said "essentially"?

25 A I don't remember what you said, so...

1 Q Okay. What did you -- I'll just ask it a different
2 way.

3 When you say "The indenture is central
4 to the transaction" in the first sentence of
5 paragraph 43, what did you mean by "central to the
6 transaction"?

7 A I thought I answered that.

8 Q And I'm just -- I'm not sure that I understood it.
9 So if you could just answer it again, I would
10 appreciate it.

11 A In --

12 Q Are you basing it on the wording in the documents?

13 A In the wording of the documents? Yes.

14 Q Okay. And then -- all right.

15 But paragraph 43 is under a headline
16 that says, "Absent the indenture, the transaction
17 documents remain inextricably linked and constitute
18 an unapproved management contract."

19 A Yes.

20 Q Is that your opinion, your expert opinion?

21 A Yes.

22 Q Now, are you stating that as a matter of law these
23 constitute an unapproved management contract?

24 A I am stating that this is what I think the NIGC would
25 determine.

1 Q Okay. Thank you.

2 In the next paragraph, 44, you talk
3 about the bonds, security agreement, and LOM
4 incorporating default remedies.

5 A Yes.

6 Q What do you mean by "incorporate"? What does that
7 mean?

8 A Well, I hadn't noticed this, but this also has the
9 wrong citation.

10 Q Okay.

11 A And what I mean by "incorporate" is that the -- you
12 look at the agreements, and the agreements say the --
13 that the -- those other -- those agreements have the
14 same default remedies as -- as -- well, it's actually
15 what was in the indenture, but -- which is one of the
16 reasons why it makes this so hard, is that if there's
17 no indenture, are there default remedies?

18 But also the bondholders or receiver
19 could theoretically assume management control under
20 the default remedies. They're listed in each of
21 these documents.

22 Q And when you said "the wrong citation," that's what
23 you were talking about just a little while ago, that
24 that -- in paragraph 56, you would also change the
25 citation here --

1 A Right.

2 Q -- in paragraph 44?

3 A Right. The bond purchase agreement section to refer
4 to Section 6 rather than Section 9.

5 Q In your analysis, did you evaluate the difference in
6 language between "incorporate by reference" or
7 "reference" or use the same language?

8 Do you make distinctions in your
9 analysis when you have -- this is just a horrible
10 question, so let me start over from the top.

11 When you say "The documents
12 incorporate," use that verb, "incorporate" --

13 A Um-hmm.

14 Q -- was that the language in these agreements,
15 "incorporate"?

16 A Not usually. I don't remember there being -- that
17 they used that term.

18 Q Okay. But is it fair to say that when you say --
19 because you said "incorporate," you read whatever the
20 language was in those agreements to be equivalent to
21 "incorporating"?

22 A Yes.

23 Q Okay. We talked earlier you submitted an affidavit
24 in the Waukesha matter --

25 A Yes.

1 Q -- is that right?

2 This third opinion --

3 A Yes.

4 Q -- isn't in the Waukesha affidavit. Do you remember
5 that?

6 A "Absent the indenture"?

7 Q Right.

8 A No, I really didn't remember that, but...

9 Q Okay. Do you remember when you came to have this
10 third opinion?

11 A When I came to have this third opinion. I --

12 MR. CLARK: Could you read the prior
13 question and answer back when she's looking?

14 Could you read the prior question and
15 answer?

16 (A discussion was held off the record.)

17 THE WITNESS: If I remember right, counsel
18 asked me to answer the question of whether -- you
19 know, to provide my views on this issue.

20 BY MS. McNALLY:

21 Q So sometime between the time the Waukesha affidavit
22 was filed, which you might recall was in May of 2013,
23 and the time that you signed this one in June of
24 2013, counsel asked you to render an opinion on this
25 third topic?

1 A I don't specifically remember, but -- I don't
2 specifically remember.

3 Q Okay. Was there a time where you were ever asked to
4 give an opinion and you were unable to give an
5 opinion that counsel asked you to give?

6 A Oh, on -- you mean on the specifics of this?

7 Q In this case have you ever been asked to give an
8 opinion that you said you weren't able to give?

9 MS. HOGEN MOLINE: Are you asking her if
10 her -- if counsel for the tribal parties asked her to
11 give an opinion?

12 MS. McNALLY: Yeah.

13 THE WITNESS: I don't specifically
14 remember.

15 BY MS. McNALLY:

16 Q Okay. Then in the back, in the last section --
17 starting on page 13 at the bottom, paragraph 48,
18 there's a heading above it: "The transaction
19 documents are individually management contracts
20 subject to NIGC approval."

21 A Yes.

22 Q Do you see that? And is that your opinion?

23 A Yes.

24 Q And is it accurate to say that that opinion is not as
25 a matter of law, but your opinion is that the NIGC

1 would view the transaction documents as being
2 individual management contracts?

3 A That the -- the list of documents would be -- would
4 also be considered management contracts, yes.

5 Q So you don't have an opinion as to whether they
6 actually are under the law. Your opinion is only
7 what NIGC would say?

8 A Yes.

9 Q Okay. And you talk about -- you talk about the
10 indenture, the security agreement, the bond, bond
11 purchase agreement, account control agreement, and
12 tribal agreement and tribal resolution. Right?

13 A Yes.

14 Q Okay. And as to each of those, that's your view of
15 what the NIGC's view would be about whether they're
16 management contracts?

17 A Yes.

18 Q Okay. Have you exhausted your reasons for each of
19 these conclusions in this affidavit?

20 A There is one -- one section that I saw that merits
21 bringing up that wasn't put in here. Like I said,
22 there are probably many provisions that weren't
23 cited, but they weren't major.

24 There is one provision that, when I
25 was looking through the documents this morning, I

1 saw, and it would cause me great concern. And that
2 is if you look at the bond itself, bond series,
3 "Taxable Gaming Revenue Bond, Series 2008," there is
4 a section that says -- on page 5, it's the
5 second-to-last paragraph, it says, "To the extent
6 permitted by and as provided in the indenture, the
7 terms and provisions of the indenture, or any
8 instrument supplemental thereto, may be modified or
9 altered by the assent or authority of the registered
10 owners of at least 66 2/3 percent in aggregate
11 principal amount of the bonds then outstanding
12 thereunder."

13 Now, since -- even if we're --
14 essentially, what that seems to say is that the
15 bondholders could change any part of the -- 66 2/3
16 percent could change any part of the indenture, which
17 is -- because there are management functions in the
18 indenture, you know, it's just -- gives them
19 unbelievable control.

20 Q You noticed that today?

21 A Yep.

22 Q And I'm guessing you noticed that since we talked
23 about things you noticed this morning?

24 Did you notice that at lunch?

25 A No. No, no. This is something that I noticed this

1 morning when I was tabbing things.

2 Q And you noticed that when you were going through the
3 documents in preparation for your deposition today?

4 A Yeah.

5 Q Okay. Anything else jump out at you today?

6 A No.

7 Q No? Okay. If you look at paragraph 60.

8 A Sixty?

9 Q Um-hmm.

10 A Yes.

11 Q Talking about the LOM?

12 A Yes.

13 Q And it starts: "To the extent the LOM is a
14 contract"?

15 A Yes.

16 Q Is that the kind of language that NIGC would use?

17 A No, I don't believe so, because the NIGC would, more
18 likely than not, decide whether it's a contract
19 before opining.

20 Q All right. Then I'm a little confused because I
21 thought you said this section is your prediction of
22 what the NIGC would do.

23 A That hasn't changed.

24 Q Okay. So what would then -- but except -- so is that
25 the case, except as to this last thing about being a

1 contract?

2 A You mean that --

3 Q You're not making a prediction about what the NIGC
4 would do about whether it's a contract?

5 A I did not make a prediction about what they would say
6 about it being a contract.

7 Q Okay. And then is it fair to say you don't have an
8 opinion about that?

9 A Yes.

10 Q Okay. And then is it your view in paragraph 61 that
11 the tribal resolution is a contract?

12 A I did not opine on that. I was not asked to opine on
13 that.

14 Q Okay. Well, when you say "It is a void management
15 contract," does that mean it is your opinion that the
16 resolution is a contract?

17 A Well, I know that the resolution claims to be a
18 contract.

19 Q All right. I'm just asking, do you have an opinion
20 as to whether the resolution is a contract?

21 A No.

22 Q Okay. And do you have an opinion as to whether any
23 other documents that aren't specifically addressed in
24 this report are management contracts?

25 A No, because I was asked to review these, and these

1 are the ones I reviewed.

2 Q Okay. Did you ever ask for any documents to review
3 that you were not provided with?

4 A You mean was anything withheld from me?

5 Q Yeah. Was there anything you asked for and you
6 didn't get it, whether or not it was withheld. Maybe
7 it didn't exist.

8 But was there anything you wanted that
9 you weren't able to get?

10 A No.

11 Q Okay. And do you feel like you had sufficient
12 materials to reach the opinions you've reached?

13 A Yes.

14 Q Okay.

15 MR. TUREK: Off the record.

16 (A break was taken at 1:55 p.m.)

17 (Back on the record at 2:04 p.m.)

18 BY MS. McNALLY:

19 Q I think I might have misspoken.

20 On that last point about -- you said
21 you don't have an opinion whether the tribal
22 resolution is a contract.

23 A If it -- right. If it is a contract, it appears to
24 have the indicia of management in the management
25 contract.

1 Q Although, am I right to say that your opinion isn't
2 that it is a management contract; your opinion is
3 that the NIGC would think it's a management contract?

4 A That's right.

5 Q Okay. And then, also, you don't have an opinion
6 about whether the NIGC would view it as a contract,
7 correct?

8 I think I asked you whether you have
9 an opinion as to whether it's a contract. And really
10 what I want to know is whether you have an opinion
11 whether the NIGC would view it as a contract.

12 A What number is this?

13 Q Sixty-one.

14 A Sixty-one.

15 Q Tribal resolution.

16 A If I remember right, this is a -- this claims to be a
17 contract with the trustee.

18 My view is that the NIGC would say
19 that it's no longer a contract because the
20 contract -- to the extent it was a contract, it isn't
21 a contract because of the fact that the entity it's
22 with is no -- no longer there. You know, there is no
23 trustee.

24 Q So is it -- so then do you have an opinion about
25 whether the NIGC would view the tribal resolution as

1 a contract?

2 A As I said, I think the NIGC would say that -- that
3 it's not a contract because there's no trustee.

4 Q Okay. Then the next thing is we talked a little bit
5 about training and you described the one-on-one
6 training and the mentoring --

7 A Yes.

8 Q -- and those types of things.

9 And just in case my questions weren't
10 clear, is that the type of training that was provided
11 also to people who were not attorneys who were
12 reviewing contracts, or was there any different
13 training provided to them?

14 A The only other people that weren't attorneys that
15 were reviewing them were -- were people who had been
16 there since the beginning of time and were part of
17 the development of the policy.

18 And so -- so there wasn't specific
19 training given to them.

20 Q They were in on the evolution --

21 A Yes.

22 Q -- so they didn't need to have training?

23 A Well, they were certainly given more advice and
24 assistance than maybe we might -- someone who was
25 a -- a very experienced attorney in this. But, you

1 know, they were very experienced themselves in it.

2 Q Okay. And then I forgot to ask you, on your CV,
3 Exhibit 1, it says "Publications" at the bottom.

4 Is this a full list of publications
5 you've written?

6 A Those are things that I wrote since I left the
7 federal government in 2010.

8 Q Okay. And did you -- not including things like your
9 letters or your work product in your role, did you
10 have any publications before you left the government?

11 Did you write any articles, that kind
12 of thing?

13 A I don't think I wrote any articles that were
14 attributed to me.

15 Q Did you write any articles that weren't attributed to
16 you?

17 A Sure.

18 Q Okay. And what were those topics? What do you
19 recall?

20 A I don't recall. I remember writing an article for
21 the chairman. I wrote testimony. I wrote a lot of
22 things.

23 Q And did you do that in your role as -- whatever role
24 you had at the time at the NIGC?

25 A Yes.

1 Q Okay. Did you -- so that would be your work product
2 in your role at the NIGC?

3 You were doing that in the capacity of
4 your job?

5 A I was doing it in the capacity of my job, yeah.

6 Q Right. Did you do any publications other than in the
7 capacity of your job --

8 A No.

9 Q -- during that time period? Okay.

10 One of the publications I just want to
11 ask you about is the "Spotlight on Penny Coleman,"
12 which I think is such a great title. I want to have
13 an article about me some day, a spotlight on me.

14 (Exhibit 3 marked for identification.)

15 BY MS. McNALLY:

16 Q Does this -- this appears on Exhibit 1, this article?

17 A Okay.

18 Q Right?

19 A Yeah.

20 Q "Internet Gaming Q&A"?

21 A Um-hmm.

22 Q Who was the "Q"? Who was the questioner in this
23 piece?

24 A The -- one of the editors gave me the questions, and
25 I wrote the answers.

1 Q Okay. Did you write the section in italics at the
2 top?

3 A I believe that that actually came off of my website.

4 Q I want to ask you about the third sentence down, I
5 think.

6 It says: "As lead counsel" -- talking
7 about your time at the NIGC -- "she reviewed hundreds
8 of contracts and developed groundbreaking analysis on
9 managing without an approved management contract and
10 IGRA's sole proprietary interest requirement, which
11 resulted in millions of savings for tribes."

12 Do you see that?

13 A Yes.

14 Q Was that your language?

15 A Yes.

16 Q What did you mean by developed -- in your role as
17 lead counsel, you developed groundbreaking analysis
18 on managing without an approved management contract?

19 A Well, as you have noted, there isn't a lot of
20 management contract classes out there because
21 management contracts and sole proprietary interest
22 analysis under IGRA was nonexistent. And every
23 agency has to figure out how they're going to
24 implement an act.

25 And I -- because I was the person

1 there who was working on it and I was the lead in the
2 evolution of this, that's what I meant.

3 Q What do you mean by "managing without a management
4 contract"? What did that mean?

5 A Well, that means controlling, directing, organizing.
6 Any of the indicia of management. If you're doing
7 the things that constitute management and you're not
8 an individual employee, you're a company, then under
9 IGRA, you're required to have an approved management
10 contract.

11 Q Oh, so what you're saying here is that an analysis so
12 that people don't manage without an approved
13 management contract? Is that kind of --

14 A Right.

15 Q -- what you mean?

16 A Right.

17 Q Okay. And the groundbreaking analysis, is that the
18 analysis used in the letters you signed while you
19 were at the NIGC?

20 A Well, certainly that's somewhat -- some of it, but
21 really, the groundbreaking analysis applies more to
22 the sole proprietary interest because that's
23 something that was -- you know, happened more in the
24 last five years I was there and trying to figure out
25 what Congress meant by "sole proprietary interest"

1 and then apply it to -- to these contracts.

2 Q Got it. So all this is saying is essentially -- so
3 people reading this know that when you were at the
4 NIGC, you came up with kind of the approaches on
5 these topics?

6 A Yes.

7 Q Okay, great.

8 MS. McNALLY: I think my friends here have
9 some questions for you. But unless I have some
10 follow-up to them, I appreciate that you answered my
11 questions. Thank you.

12 THE WITNESS: No problem. Thanks.

13 EXAMINATION

14 BY MR. TUREK:

15 Q Good afternoon, Ms. Coleman. I just have a few
16 questions for you.

17 A Okay.

18 Q You were the acting general counsel at the NIGC from
19 2002 to 2010 approximately, correct?

20 A Yes.

21 Q And as I understand your testimony, was there any
22 point during that time where you sought to have the
23 acting title removed from your designation?

24 A Yes.

25 Q When was that?

1 A I don't remember.

2 Q And was there a process that that went through? Did
3 you apply for the position, a full-time position?

4 A No. It's a full-time position.

5 Q I understand that. A full -- permanent position.

6 A It -- since it's the lead counsel position, there
7 isn't any particular process.

8 It's -- the chairman hires whoever he
9 wants to hire.

10 Q Were you turned down in the request to have the
11 "acting" label removed from your title?

12 A No.

13 Q At the time, this 2002 to 2010 period, Phil Hogen was
14 the commissioner of the NIGC?

15 A Yes.

16 Q I believe Mr. Hogen left in October 2009. Does that
17 sound right?

18 A Yes.

19 Q And in this position as the commissioner, Mr. Hogen
20 was essentially your boss, correct?

21 A Yes.

22 Q Did you get along with Mr. Hogen?

23 A I definitely got along with him.

24 Q How would you describe your relationship with

25 Mr. Hogen while he was the commissioner and you were

1 the acting general counsel?

2 A He -- I thought a lot of him. I thought he was a
3 very smart, capable man. We worked well together.
4 We both spoke South Dakota. It worked real well.

5 Q Did you have an understanding of whether he thought
6 the same of your performance as an attorney?

7 A I think he thought that, yes.

8 Q Did he say things to you about how he appreciated the
9 work that you were doing for the NIGC?

10 A Yes.

11 Q Did you get performance reviews from him over the
12 years?

13 A No.

14 Q Mr. Hogen, I think you referenced earlier, was a
15 reference on the resume that we haven't seen today,
16 correct?

17 A Yes.

18 Q And so you would expect that if someone called
19 Mr. Hogen to ask about you, he would give you glowing
20 accolades?

21 A I would expect him to, yes.

22 Q Since you've left the NIGC, have you done anything
23 socially with Mr. Hogen?

24 A I don't think so, no.

25 Q You understand that Mr. Hogen is a member of the law

1 firm that's representing the tribe in this case,

2 correct?

3 A Yes.

4 Q And your dealings with counsel in this case have
5 primarily been with Mr. Hogen's daughter, Mrs. Hogen,
6 correct -- Ms. Hogen?

7 A Yes.

8 Q At any point before today, have you been involved in
9 a bond transaction as a lawyer?

10 A I've been -- my involvement has always been from the
11 general counsel.

12 Q So you've never been representing one of the parties,
13 either the bond issuer --

14 A No.

15 Q -- or one of the other parties involved in the
16 transaction --

17 A No.

18 Q -- correct?

19 A Right.

20 Q You said "right" at the end?

21 A Yes.

22 Q Have you ever drafted bond documents?

23 A No.

24 Q Have you ever litigated the enforcement of any bond
25 documents at any point?

1 A No.

2 Q Have you been involved at any point prior to today in
3 any transactions related to securities at all?

4 A Have I been involved?

5 Q Yeah.

6 A You mean in the same vein of the questions that
7 you've asked?

8 Q Well, let me clarify. In a professional capacity. I
9 don't necessarily need to know if you have an E*Trade
10 account and what your stocks are, but I want to know
11 if you've been involved in any professional capacity
12 in any kind of transaction involving security
13 instruments.

14 A After being general counsel?

15 Q Let's start first before you were -- strike that --
16 yeah, let's talk about any time.

17 Anytime before today, have you been
18 involved in a bond -- strike that.

19 Anytime before today, have you been
20 involved in a transaction involving the purchase,
21 sale, or transfer of securities?

22 A I believe that there were -- that that happened, and
23 there were documents that we reviewed at the NIGC.

24 Q All right. But, again --

25 A Not -- I didn't write security agreements; I didn't

1 represent either side to an agreement, no. I was a
2 government lawyer.

3 Q And you've been a government lawyer for the vast
4 majority of your legal career, right?

5 A Yes.

6 Q And since leaving the government back in 2010, have
7 you been involved in any kind of transactions at all
8 where you've represented one side or another in a
9 financial transaction?

10 A No.

11 Q So your understanding about bonds, indentures, bond
12 purchase agreements, things like that, has come
13 inclusively from your time working as a government
14 lawyer?

15 A Yes.

16 Q I want to ask a little bit about IGRA.

17 Is it fair to say that the intent of
18 IGRA was to prevent unscrupulous outside parties from
19 actively managing a tribe's gaming operations?

20 A That is one, yes.

21 Q What other purposes would there be?

22 A To ensure the tribes are the primary beneficiary.

23 There are others that don't come to
24 mind.

25 Q The initial concern at the time the statute was

1 passed was about outside parties actively coming in
2 and managing a tribe's gaming operations, true?

3 A Yes.

4 Q And then at some point, there was a concern about the
5 evolution of the management process by outside
6 parties. Would that be fair?

7 A Well, it's not so much the evolution as companies
8 became slicker at interjecting themselves into
9 management.

10 Q And one of the first ways that that manifested itself
11 was through consulting agreements, correct?

12 A Yes.

13 Q And so the NIGC created a bulletin to talk about the
14 distinction between consulting agreements and
15 management contracts?

16 A Yes.

17 Q Initially, in that first four or five years of IGRA's
18 application, was there concern about financing
19 transactions equating to management contracts?

20 A Not as much. The NIGC wasn't seeing financing
21 documents as much.

22 Q When did an active review of financing documents
23 begin?

24 A Well, there -- well, there was always an active
25 review of whatever documents were submitted.

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1 Certainly, the 2005 decision that told
2 people that attorneys might be guilty of malpractice
3 if they didn't submit their documents to the NIGC
4 made them realize that they had better do that.

5 But at first, there was -- there
6 was -- there was always review of some financing
7 agreements. It -- the bond review didn't start until
8 closer to the 2000s rather than the 1990s.

9 Q This 2005 document you just referenced, is that a
10 declination letter?

11 A No, no. It was a court case.

12 Q Court case. Which court case?

13 A I think I reference it in the -- my affidavit. It
14 involves Dorsey & Whitney. They're one of the
15 parties.

16 I am not seeing it in my affidavit. I
17 do remember it is in Kevin Washburn's affidavit.

18 Q Is it a federal district court decision? An
19 appellate decision?

20 A It's a federal district court decision. I think it
21 was appealed. I don't remember.

22 Yeah, I don't see it in there.

23 Q And the concern with the financing arrangements was
24 the same with the consulting agreements. The NIGC
25 was concerned that those financing arrangements would

1 camouflage as a management of the operations of the
2 gaming operations --

3 A Right.

4 Q -- correct?

5 A Right.

6 Q In connection with that review of financing
7 agreements, did the NIGC ever promulgate any kind of
8 regulations specific to the review of financing
9 arrangements?

10 A No.

11 Q At any point has the NIGC issued a bulletin of any
12 kind specific to whether financing arrangements
13 constitute management contracts?

14 A That was specific to finance agreements?

15 Q Yes.

16 A No.

17 Q Is there any bulletin at all that relates to
18 management contracts for financial transactions?

19 A Well, I believe that 94.5 does -- dash 5 does because
20 it gives the general description of what is
21 considered to be management.

22 Q And at the time 94-5, that bulletin, was promulgated,
23 financing arrangements weren't really the focus of
24 the NIGC's review, correct?

25 A At that time consulting agreements were the bigger

1 problem. It doesn't mean that that issue hadn't come
2 up, but it was not considered to be the big problem
3 that was facing the NIGC.

4 Q And as review of financial agreements became more and
5 more pronounced, the NIGC never issued any kind of
6 bulletins specific to financing arrangements?

7 A That's right.

8 Q The review process that we talked a little bit about
9 today, the two-stage process, the submission to
10 management of management contracts, and then the
11 R contract process --

12 A Yes.

13 Q -- the submission of management contracts is actually
14 governed by regulation, correct?

15 A Yes.

16 Q The submission of R contracts or the declination
17 process is not covered by regulation.

18 A That's right.

19 Q And it's a voluntary process, this R submission
20 process, that is optional to the parties that are
21 parties to those agreements?

22 A Yes.

23 Q You yourself did not approve any management
24 contracts. That was the function of the
25 commissioner.

1 A That was the function of the chairman.

2 Q The chairman.

3 As part of the chairman's review of
4 management contracts, did you ever provide any kind
5 of guidance, or were you really a separate part of
6 the agency?

7 A Pardon?

8 Q As the chairman was doing his approval and review of
9 management contracts, were you involved in providing
10 any advice on that process?

11 A Yes.

12 Q How would that advice be communicated?

13 A Unless the contract brought up unique issues or it
14 was one where we were going to -- where we were
15 recommending that despite everything, all the changes
16 that may have been made, we were going to still
17 recommend disapproval, the contract and any of the
18 agreements that went with it would go to the chairman
19 in a file with a memo from the Division of Contracts
20 and from the Office of General Counsel laying out the
21 deal, explaining the provisions, and recommending
22 approval.

23 Q And, again, that process that you've just described
24 is very different than your work on the declination
25 process, true?

1 A Yes.

2 Q Did anyone review your opinions made during the
3 declination?

4 A You mean anyone higher than me?

5 Q Yes.

6 A That was only the chairman. And, generally, he would
7 not.

8 Q So just walk me through how would that work? Someone
9 submits contracts for you to comment on, get an
10 advisory opinion on?

11 A Right.

12 Q You would prepare an opinion letter, correct?

13 A Well, usually at the time I left and had a staff of
14 20, it would be assigned to an attorney who would
15 work on it, prepare it, would come to the associate
16 general counsel with issues who -- and they may both
17 come to me with issues to resolve.

18 And then the memorandum would be
19 prepared and final and be signed off on by the
20 associate general counsel and then signed by me.

21 Q You, as acting general counsel, had the ultimate
22 authority over those declination letters, true?

23 A Unless the chairman decided to exercise that
24 authority.

25 Q How many times during your run as acting general

1 counsel did the chairman intervene in one of your
2 declination decisions?

3 A Very rarely.

4 Q Less than five? More than five?

5 A I don't know.

6 Q And in the times that the chairperson intervened, did
7 he overrule the determination that you had made?

8 A I don't remember him ever overruling because that
9 wouldn't necessarily be how we -- why the chairman
10 might get involved. It might be because there's
11 something unique and I wanted to make sure that he
12 was comfortable with the approach.

13 One of the great things about being
14 there for as long as I was is that I was able to
15 develop a relationship where I had a good feel for
16 what he wanted and what he would agree with and what
17 he wouldn't agree with. And if something was
18 something I wasn't sure about, I would be able to
19 talk to him.

20 Q You're familiar with your various opinions on how
21 pledged revenues are handled in your declination
22 letters?

23 A Yes.

24 Q Did you ever talk to the chairperson at any point
25 about how you were handling opinions about pledged

1 revenues and financing arrangements?

2 A I don't remember.

3 Q Would you agree that there is no statute and no
4 regulation that requires a party to submit all of
5 their agreements in a financing transaction to the
6 NIGC for review?

7 A In this voluntary process, that's true.

8 If we -- if the NIGC decides that they
9 want to see those contracts, then there is statutory
10 process. They can -- they can ask for them first, or
11 they can subpoena them.

12 Q But as part of the declination process that underlies
13 most of your opinions about intertwinement and
14 submitting together, would you agree with me that
15 there's no statute or regulation --

16 A That mandates.

17 Q -- that requires all those agreements to be submitted
18 by the submitting parties?

19 A That's right.

20 Q And, in fact --

21 (Exhibit 4 marked for identification.)

22 BY MR. TUREK:

23 Q I'm going to start over again.

24 I'm going to show you what's been
25 marked as Exhibit 4.

1 And isn't it true that 25 CFR Section
2 533.3 governs the process for submitting a management
3 contract for approval?

4 A It says "Submission of Management Contract for
5 Approval."

6 Q And it says, "A tribe shall include in any request
7 for approval of a management contract under this
8 part," colon, and then lists some items, correct?

9 A Yes.

10 Q Does it say in here "collateral agreement" at any
11 point?

12 A No.

13 Q Does it say "All contracts that are part of the same
14 transaction as the management contract"?

15 A It doesn't say -- it doesn't refer to any additional
16 contracts.

17 Q So any informal practice of getting more documents
18 beyond the management contract was an informal
19 request and procedure by the NIGC, correct?

20 A If the question is, is it in the regulations, I do
21 not see it in the regulations.

22 Q And so the requests that you've been describing
23 that's described in your affidavit, the submission
24 process, is an informal practice that was proposed by
25 the NIGC and taken up voluntarily by parties

1 submitting agreements, true?

2 A Are we talking about the management contract
3 approval, or are we talking about R contracts?

4 Q We're talking about the declination process.

5 A Okay. This part, 533, doesn't have anything to do
6 with the declination process.

7 Q This is the process that we were describing earlier
8 that the commissioner does -- the chairperson does
9 the review, correct?

10 A Yes. The Division of Contracts assumes staffing
11 authority -- primary staffing responsibility.

12 Q Then set 533.3 aside.

13 And I think maybe you agreed with me;
14 maybe you didn't. But are there any regulations that
15 require submitting parties to provide all of the
16 contracts that are part of a transaction that
17 includes a management contract?

18 A Not in 533. I would have to review the rest of the
19 regulations to be sure.

20 Q All right. What regulations would you like me to
21 pull up for you?

22 A Well, the whole NIGC.

23 Q Okay. Well, maybe we'll do that, but as you sit here
24 right now as being acting general counsel for ten
25 years at the NIGC, can you point me to any regulation

1 that states that all the contracts, as part of a
2 transaction that includes a management contract, need
3 to be submitted as part of the declination process?

4 A There isn't anything that uses those words.

5 It -- I know that the commission has
6 the authority that will require that the rest of the
7 contracts be submitted. They started doing that in
8 order to be able to see what the deal is. There's
9 certainly a lot more to approval of management
10 contracts than there is here.

11 For instance, where it's -- there is a
12 section that says that a trustee -- there it is,
13 "Trustee exercising the skill and diligence to which
14 a trustee is commonly held would not approve the
15 contract." And it's extremely difficult to implement
16 that part of the section of the approval process
17 without having the deal in front of them.

18 And then there is a whole section in
19 the regulations that talk about the 30 percent -- the
20 date -- it talks about the fact that you can only
21 have a 30 percent fee and can't exceed 40 percent.

22 If you don't see all of the documents,
23 it's impossible to know if it's 30 percent, because
24 what happens is that -- not all management
25 contractors, but some management contractors will

1 sprinkle the percentages throughout other contracts
2 in an effort to up the amount of percentage they
3 receive, but not have it all be in the management
4 contract.

5 Q All right. I want to go back to my question, which
6 is: Can you point me to any regulation that states
7 that a submitting party, as part of the declination
8 process, needs to submit all of the agreements that
9 are part of that transaction?

10 A The declination process, as I said, is not part of
11 this at all. There are no regulations on the
12 declination process.

13 Q And so it follows, then, that there's no regulation
14 that requires all of the documents to be submitted as
15 part of the process, true?

16 A That is right. It's a voluntary process.

17 Q And so the points that you were just making, which is
18 in 533.6, looks like sub 5, sub 4, about a trustee
19 and the 30 percent fee, that's about the formal
20 approval of management contracts.

21 A That's right.

22 Q And does that formal approval of management contract
23 process have any relevance to your opinions in this
24 case?

25 A Well, if a contract is a management contract and it's

1 not being submitted pursuant to these regulations,
2 then the -- the contractor and the tribe are out of
3 compliance with the regulations.

4 Q Right. Okay. So let me be more specific.

5 You make opinions about intertwinement
6 and whether all these documents would be viewed as
7 one transaction or one document.

8 Does the process related to the
9 approval of management contracts have any relevance
10 to those opinions about intertwinement and so on?

11 A Yes.

12 Q How so?

13 A Well, because when the chairman is deciding what
14 needs to be approved and what doesn't, he looks at
15 those kind of issues.

16 Q And now I'll ask some more questions about this,
17 then.

18 Are there any regulations on the more
19 formal management approval process that require a
20 party in the first instance to submit all of the
21 documents that are part of the transaction for the
22 commissioner's review?

23 A Not in those words.

24 Q And if I understand you correctly, the NIGC -- strike
25 that.

1 As I understand it, the commissioner
2 has the ability to request those materials --

3 A Yes.

4 Q -- from the parties, correct?

5 A Yes.

6 Q And it not only can request them, but can order them
7 to be produced by the parties?

8 A Yes.

9 Q But the parties themselves don't have to provide them
10 to the commissioner in order for the approval process
11 to occur, true?

12 A The NIGC is taking the position that those documents
13 all have to be submitted.

14 Q And now let me understand the origin of that request
15 from the NIGC.

16 Is that regulatory?

17 A That's a practical application of the -- of the
18 requirements for approval.

19 Q And is that embodied in a bulletin?

20 A Actually, I think it is.

21 Q Do you know the number of the bulletin?

22 A No.

23 Q Regardless of what it is, is it considered an
24 informal agency policy to have those documents
25 submitted by the parties in one grouping?

1 A I'm not getting -- understanding where you're going
2 with this.

3 I mean, is there anything -- any
4 regulation that says, "You will submit all of these"?
5 No.

6 Q The next series of questions I'm going to focus just
7 on the declination process. So I'm not as concerned
8 now about the formal review process.

9 A All right.

10 Q I asked you some questions about whether there were
11 regulations requiring submission of the documents by
12 the submitting parties. And this question is a
13 little different.

14 A Okay.

15 Q Are there any regulations that provide that the NIGC
16 must review all of the documents together in its
17 evaluation of whether the transaction constitutes a
18 management contract?

19 A No.

20 Q Is there any informal agency practice or policy that
21 dictates that all of the documents must be reviewed
22 together?

23 A Informal agency practice, yes.

24 Q And the practice would be one that was developed by
25 the lawyers who are doing the review process?

1 A It was -- well, it was developed as part of that, but
2 it was also developed in -- as a result of case law,
3 the -- the consulting agreement that had been
4 submitted and had -- the OGC had opined that it was
5 not a management contract.

6 But then there was a lending agreement
7 that required the consultant to have everything he
8 did -- well, required the tribe to follow everything
9 the consultant told them to.

10 You know, those kinds of practical
11 problems are what caused the agency to develop the
12 practice of saying, "Give us everything so that we
13 can look at it," because the practice -- the process
14 is for protecting companies, protecting tribes. It's
15 a way to not have a notice of violation, not have an
16 enforcement. It's, like I said, a voluntary
17 practice.

18 Q Right. And the tribes or the other parties to the
19 transaction don't have to submit everything to the
20 NIGC for an informal review?

21 A At their risk.

22 Q I believe your first sort of macro level opinion is
23 that all of the various bond documents fall because
24 the indenture is void.

25 Is that a fair characterization?

1 A Essentially.

2 Q And I believe you argue that these other bond
3 documents, the nonindenture documents, are
4 intertwined with the indenture; is that right?

5 A Yes.

6 Q And that opinion about intertwinement, what is that
7 based on? What's sort of the legal authority for
8 that conclusion? And maybe it doesn't have to be
9 legal, but what's your reasoning for why there's
10 intertwinement?

11 A Because the documents are dependent upon each other.
12 They can't be read separately.

13 Q And in reaching that conclusion about dependency, did
14 you consult any case law?

15 A When the agency -- I think case law came at about the
16 same time that the agency was developing those
17 policies.

18 Q Bad question. I want to be a little bit more
19 specific.

20 A Okay.

21 Q In this case you said intertwinement and dependency;
22 the documents are dependent on one another.

23 In reaching that conclusion in this
24 case about dependency, did you consult any case law?

25 A I consulted the practice of the NIGC, that's what I

1 looked to, to see what they would do.

2 Q So that's a "no" on the case law question, correct?

3 A I would say so, yes.

4 Q Did you consult any statutes?

5 A No.

6 Q Did you consult any regulations?

7 A No.

8 Q It was simply the practice of the NIGC during the
9 time that you were there, true?

10 A And since, yes.

11 Q And when we talk about the NIGC practice, that would
12 be the declination review process, correct?

13 A Yes.

14 Q That you were the sole -- the lead authority on at
15 the agency, correct?

16 A Yes.

17 Q Of the people that reported to you while you were at
18 the NIGC, have any of them left?

19 A Yes.

20 Q Did you consult with any of them in reaching your
21 conclusions about intertwinement and dependency in
22 this case?

23 A On this?

24 Q Yes.

25 A No.

1 Q Has anyone, to your knowledge, reviewed your
2 conclusions in this case about intertwinement or
3 dependency?

4 A Reviewed my conclusions?

5 Q Right. Did you submit them to anyone to review or
6 check for you?

7 A No.

8 Q Again, I don't want to leave here without -- not
9 knowing your -- specifically what you're saying.

10 And so correct me if I'm wrong, but
11 the basis for your conclusion that the other bond
12 documents are intertwined with the indenture is the
13 practice of the NIGC?

14 A The practice of going through the documents,
15 identifying documents that are incorporated by
16 reference, documents when the -- when a contract says
17 you have to do something that's in another contract.
18 Much like the consulting and loan agreement, when one
19 says you have to do something in another.

20 Q And so the agency practice that you were describing,
21 then, leads to a review of the language in the
22 agreements, correct?

23 A Yes.

24 Q And so when you talk about the basis for your
25 opinions that these agreements are dependent on one

1 another, it's really focusing on the specific

2 language of the various bond documents, true?

3 A Yes.

4 Q And then your say-so as to whether those are
5 independent or not?

6 A I'm not real sure what you're saying.

7 Q All right. You reviewed the contract language in the
8 bond documents to determine whether they are
9 independent, correct?

10 A Yeah. Yes.

11 Q And, then, not based on any case law, not based on
12 any statute, not based on any regulation, you
13 yourself came to the conclusion that these are
14 dependent on one another, true?

15 A Based on the way the NIGC has been approaching it for
16 the last 15 years, yes.

17 Q And that informal process, that's not reviewed by
18 Congress or anyone else, correct?

19 A Yes.

20 Q And that process that was made at the NIGC as to
21 whether there was interdependence between the
22 contracts, was that a determination that was made by
23 the in-house legal staff at the NIGC?

24 A Are you asking if work -- I believe that's something
25 that the lawyers and contract people developed

1 together.

2 Q And, ultimately, the determination of whether there
3 was interdependency was a call that a lawyer made at
4 the NIGC, correct?

5 A The general counsel, yes --

6 Q That would be you?

7 A -- or deputy. Yes.

8 Q Right. So people could present their findings to
9 you, but, ultimately, the conclusion of whether there
10 was interdependency between the agreements was a
11 legal call that you made at the time you were there,
12 true?

13 A It was a fact-based decision. I don't know whether
14 you would want to call it a "legal call" or if
15 it's -- or what, but it was a decision by the general
16 counsel.

17 Q A layperson was not making the determination of
18 whether there was interdependency, correct?

19 A Not usually.

20 Q And in making your interdependency determinations,
21 you would often discuss the application of certain
22 contract provisions, correct?

23 A Yes.

24 Q And you would cite case law at points in your opinion
25 letters, correct?

1 A Yes.

2 Q Those declination decisions were legal determinations
3 that you made as the acting general counsel of the
4 NIGC, correct?

5 A As I said, they're opinions that were provided.

6 Q In your role as the lawyer for the NIGC.

7 A In my role as the general counsel.

8 Q Let me just ask a couple, I think, last general
9 questions on this topic.

10 Is it true that the only agreements
11 that are void under IGRA are those agreements that
12 constitute management contracts that have not been
13 approved by the commission?

14 A Management contracts, yes, or agreements that include
15 management, so -- and I -- I think of them as being
16 one and the same. If it has one provision of
17 management as a management contract, it's the same as
18 one that has all of the provisions of management.
19 And those are the ones that are void, yes.

20 Q Right. And so if an agreement is not a management
21 contract, it is not void if it is unapproved, true?

22 A Are you talking about a -- if you're talking about a
23 separate stand-alone document that has nothing to do
24 with any other document, that would be a true
25 statement.

1 Q If that document has no indicia of management and is
2 not submitted for approval, it can still be enforced,
3 correct?

4 A If it has no indicia of management and has not been
5 submitted for approval and it's still valid, yes.

6 Q And I want to -- I think this question now goes to
7 what you were referencing earlier.

8 Do you agree that a collateral
9 agreement is a management contract only if itself
10 contains the requisite indicia of management?

11 A Yes.

12 Q And that's something in case law that you've relied
13 on over the years in your opinion letters, correct?

14 A Yes.

15 Q Excuse me for one second.

16 (Pause in proceedings.)

17 BY MR. TUREK

18 Q I want to ask you some questions about the
19 enforcement procedures at the NIGC.

20 A Okay.

21 Q If the NIGC finds that an unapproved management
22 contract is in place, it can start an enforcement
23 action to shut down that gaming operation, correct?

24 A It can, yes.

25 Q While at the NIGC, you knew about litigation between

1 Wells Fargo and Lac du Flambeau arising out of this
2 2008 bond transaction, true?

3 A Yes.

4 Q I think you even referenced a couple of times Judge
5 Randa's district court opinion in some of your
6 declination letters.

7 A Yes.

8 Q That decision by Judge Randa determined that the
9 indenture was a management contract, correct?

10 A Yes.

11 Q In response, did the NIGC ever consider an
12 enforcement action with regard to gaming operations
13 at the Lac du Flambeau?

14 A I'm not in a position to answer that question.

15 Q Do you have any knowledge of enforcement proceedings
16 being considered by the NIGC as it relates to gaming
17 at the Lac du Flambeau?

18 A All I can say is, is that no action was brought.

19 MS. McNALLY: I'm sorry, what was that last
20 part?

21 THE WITNESS: No action was brought.

22 BY MR. TUREK

23 Q And, again, I don't know if that necessarily answers
24 my question, which is: Do you have any knowledge of
25 an enforcement action ever being considered at Lac du

1 Flambeau?

2 A I don't feel like I can answer that question.

3 MS. HOGEN MOLINE: Yeah, I'm going to
4 object to that. There's a federal regulation that
5 prohibits her from answering that question.

6 MR. TUREK: Do you guys have the cite? Do
7 you know what it is?

8 MS. HOGEN MOLINE: 25 CFR Part 516.

9 BY MR. TUREK

10 Q Ms. Coleman, do you believe that that CFR statute
11 precludes you from answering that question?

12 A I don't have that memorized.

13 Q What's your hesitancy? You sound like you had
14 some -- you didn't know if you could answer it, and I
15 just want to know why.

16 A Because as general counsel -- well, think of it this
17 way: Would you expect a U.S. attorney to answer a
18 question about whether or not they were considering
19 bringing an action? The answer is no. Because those
20 are internal discussions. Sometimes discussions
21 result in an action; sometimes they don't. But those
22 are not the kind of thing that I feel I can respond
23 to.

24 Q In any event, you're not aware of any enforcement
25 action ever being initiated by the NIGC with respect

1 to Lac du Flambeau?

2 A That's correct.

3 Q In your time as acting general counsel, there were
4 instances where the tribe -- a tribe and another
5 party were in litigation that implicated whether
6 agreements were management contracts, correct?

7 A Yes.

8 Q And in those instances, you refrained from opining on
9 whether there was indicia of management in the
10 agreements, true?

11 A Usually.

12 Q Why was that?

13 A There was already a forum looking at that issue.

14 Q There would be a judge that would be deciding whether
15 there was a management contract or not, correct?

16 A Yes.

17 Q And as the NIGC general counsel, you deferred to that
18 judge to let that issue play out in the courts,
19 correct?

20 A Sometimes.

21 Q Did you ever make an opinion about whether there was
22 a management contract while a matter was pending in
23 litigation on that issue?

24 A Yes.

25 Q And when the courts were looking at that same issue,

1 do you know whether or not they looked to your
2 opinions as guidance in any way?

3 A I understand that the courts viewed the guidance --
4 the opinions as anywhere from guidance to something
5 that they just didn't feel like they needed to pay
6 attention to.

7 Q Are you aware of any court ever giving persuasive
8 value to a declination letter that you provided
9 during the time that you were at NIGC?

10 A As I remember, yes.

11 Q Can you give me the name of that court or ruling or
12 judge?

13 A No, not offhand. But as I remember, they talked
14 about Skidmore deference.

15 Q Skidmore deference?

16 A Skidmore. That's the persuasive.

17 Q And that deference -- one, I'll take you at face
18 value. I don't know what these decisions say. I
19 don't have any information about them.

20 But the deference was provided, if at
21 all, based on NIGC opinions about whether they were
22 management contracts, correct?

23 A Yes.

24 Q I understood before we sat down here today that your
25 affidavit had an exhaustive list of reasons for why

1 these agreements -- individual agreements were
2 management contracts. But I understand you've made
3 some additions today.

4 Are there any other things that you
5 can think of as you sit here that constitute indicia
6 of management in any of the bond documents that we
7 haven't spoken about today?

8 A No.

9 Q Do you have the bond purchase agreement in front of
10 you? I think it was --

11 A Yeah, I've got it.

12 (Exhibit 5 marked for identification.)

13 BY MS. McNALLY:

14 Q Ms. Coleman, just so we're working off the same page
15 literally --

16 A Okay.

17 Q -- I'm going to give you Exhibit 5.

18 A Okay.

19 Q Can I have that back for just one second? I'm sorry.
20 I just want to make sure I didn't give you the one I
21 wrote on.

22 MR. CLARK: Can we mark that?

23 MR. TUREK: It's being marked as Exhibit 5.

24 THE WITNESS: Yeah, it certainly doesn't
25 look like mine -- oh, yeah, it does.

1 MR. TUREK: I think this is a clean
2 version.

3 THE WITNESS: Okay.

4 BY MR. TUREK

5 Q I would like you to first turn to page 13.

6 A (Witness complies.) Okay.

7 Q In your declaration --

8 MR. CLARK: Do you have an extra copy?

9 MR. TUREK: Oh, yeah, I do, Jim.

10 (Pause in proceedings.)

11 BY MR. TUREK:

12 Q So we're on page 13?

13 A Yes.

14 Q All right, Ms. Coleman. We're looking at page 13 of
15 Exhibit 5, which is the bond purchase agreement.

16 A Yes.

17 Q And in your declaration you initially opined that
18 Section 9(i)(5)(iv), and Section 6(vii) were indicia
19 of management, correct?

20 A Yeah.

21 Q Are you now withdrawing that conclusion that they are
22 indicia of management?

23 A I -- yes.

24 Q And explain to me again why you are no longer of the
25 belief that those sections in the BPA constitute

1 indicia of management.

2 A Because this is just a list of documents that will be
3 received. And, in particular, 5 is just part of the
4 bond opinion. And the bond opinion is the opinion of
5 Godfrey & Kahn; it's not a contract.

6 Q And the references in the opinion letter subsection
7 to the other documents, is it fair that those are not
8 incorporations of those bond documents into the bond
9 purchase agreement?

10 A Yes.

11 Q And so because those bond documents have not been
12 incorporated into the bond purchase agreement in
13 these two sections, is it fair to say that these
14 sections are not indicia of management?

15 A Yes.

16 Q And so as I understand it now, you are turning to
17 Section 6 of the bond purchase agreement --

18 A Yes.

19 Q -- to support an opinion that there is indicia of
20 management, correct?

21 A Yes.

22 Q And, specifically, as I understood your testimony
23 earlier -- correct me if I'm wrong -- it's the
24 references to the bond documents in Section 6, sub D,
25 E, F, and G?

1 A And H.

2 Q Any other subsections in 6?

3 A No.

4 Q And would you agree that these are representations by
5 the EDC about the enforceability of those various
6 bond documents?

7 A I'm not sure what you mean by "representations," but
8 as I read Section 6, "The corporation makes the
9 following representations and warranties," I
10 understood "warranties" to be -- to mean guarantees.

11 And so the corporation is saying that
12 the indenture is enforceable, the agreement is
13 enforceable, security agreement is enforceable,
14 and -- and as are the bonds and -- and that they
15 will -- all of these -- the bonds will have the
16 security of the indenture, security agreement, and
17 the tribal agreement, all of which will be
18 enforceable.

19 Q So it's those warranties that are in those sections
20 that you believe equates to an incorporation --

21 A Yes.

22 Q -- of those documents?

23 A Yes.

24 Q When did you come to that conclusion?

25 A Actually, that's something that I had thought when I

1 first reviewed this, but -- and I'm not sure why I
2 ended up putting 9 in there instead of 6. And so it
3 was, I assume, an error on my part.

4 Q So no communications with the tribe's counsel or
5 briefing or anything like that is what led you to
6 discover this mistake?

7 A Not with respect to 6.

8 Counsel did ask me if -- if I wanted
9 to stand behind my -- I don't know exactly what she
10 said, but she directed me to look at 9. And I looked
11 at 9 and thought, what was I thinking?

12 Q Okay. So let's make sure I understand this.

13 You included 6 in your affidavit.
14 Counsel for the tribe prompted you to go back to
15 Section 9.

16 A No. I included Section 9 in my affidavit. I had --
17 in reviewing this document, I had skipped over 6. I
18 had only included 9.

19 She didn't talk to me about 6 at all,
20 but she did ask me if I was sure I wanted to include
21 9.

22 And I looked at it, realized it was a
23 list, and decided that I needed to correct that.

24 Q So it was at the urging of counsel that you've now
25 removed Section 9 as an indicia of management?

1 A Yes.

2 Q Okay. Do you have the indenture in front of you or a
3 copy of it handy?

4 A Yes.

5 Q Could you turn to page 39 of the indenture, Section
6 6.25.

7 A (Witness complies.)

8 Q Are you with me yet?

9 A Yeah.

10 Q Do you see under "Representations and Warranties" in
11 Section 6.25?

12 A Yes.

13 Q There's the phrase "Incorporated herein by this
14 reference." Do you see that?

15 A Yes. Uh-huh.

16 Q You understand that to be a means and a mechanism by
17 which parties can express their intent to incorporate
18 something else by reference, true?

19 A Yes.

20 Q Do you see that phrase incorporated herein by
21 reference in Section 6 of the bond purchase
22 agreement?

23 A No.

24 Q Do you have the issuer's opinion letter in front of
25 you? It would have been a Godfrey & Kahn issuer's

1 letter.

2 A I don't know.

3 Q Not the bond opinion letter -- bond counsel letter,
4 but the issuer's opinion letter.

5 A Yes. The opinion of whom?

6 Q Godfrey & Kahn as issuer's counsel.

7 A Yes.

8 Q Can you turn to that, please. Page 3.

9 A (Witness complies.) Okay.

10 Q In the paragraph that starts, "In rendering this
11 opinion, we have with your permission" on page 3,
12 again, there's the phrase "incorporated by
13 reference," correct?

14 A Um-hmm.

15 Q Yes?

16 A Yes.

17 Q And you don't see that language in the bond purchase
18 agreement, true?

19 A I did not see it in the bond purchase agreement.

20 Q But yet you are subscribing that intent of
21 incorporation by reference into the bond purchase
22 agreement, true?

23 A Is the question do I believe that under Section 6,
24 that the agreements have been incorporated by
25 reference? Is that the question?

1 Q No. It's a little different.

2 You've seen now two examples in the
3 indenture and in this issuer's opinion letter where
4 the parties -- one of the parties to the agreement
5 specified "incorporation by reference" to reflect
6 their intent to incorporate something into that
7 particular document, all right? Do you see that?

8 A Yeah.

9 Q And that's not in Section 6 of the bond purchase
10 agreement, true?

11 A That language, "incorporated by reference," is not in
12 there.

13 Q And yet you are attaching that same significance to
14 the bond purchase agreement as if that language had
15 been in there, correct?

16 A Isn't that what they're doing on 3?

17 Q Yeah. And they're using the phrase "incorporated by
18 reference," true?

19 A Aren't they saying that these -- that things were
20 incorporated by reference in the other documents,
21 and -- even though those other documents don't use
22 those words?

23 Q What's your understanding of what you're looking at
24 in Section 3?

25 The phrase "incorporated by

1 reference," you have an understanding of what that
2 means as a lawyer, right?

3 A Yes.

4 Q And that's, again, a mechanism that lawyers use to
5 expressly state, "We want that terminology or those
6 terms to be incorporated into this other document" --

7 A Yes.

8 Q -- correct?

9 A Yes.

10 Q And it's a common phrase that you see all the time
11 used in agreements, true?

12 A Yes.

13 Q And that language is not in Section 6 of the bond
14 purchase agreement, true?

15 A That language is not in Section 6.

16 Q Does the fact that that language is not in Section 6
17 but is in other documents that you see as part of
18 this transaction influence at all your opinions that
19 Section 6 effectuates an incorporation by reference
20 of those documents?

21 A No.

22 MR. TUREK: Okay. Take a break.

23 (A break was taken at 3:20 p.m.)

24 (Back on the record at 3:28 p.m.)

25

1 BY MR. TUREK

2 Q All right, Ms. Coleman. We're back on the record.

3 At any point while you were acting
4 general counsel at NIGC, did you determine that a
5 collateral agreement was a management contract merely
6 because it referenced another management contract?

7 A It would -- it would depend on the context.

8 Q Well, maybe I want to try to get you to -- let me see
9 if I can get you to agree to this.

10 One, there's a difference between
11 "reference" and "incorporation," correct?

12 A Yes.

13 Q Okay. At your time as acting general counsel at
14 NIGC, did you ever determine that a collateral
15 agreement that referenced a management contract
16 transformed that collateral agreement into a
17 management contract?

18 A As I said, it would depend on the context.

19 It's a -- because you don't apparently
20 understand what I mean by "incorporation by
21 reference." You know, in -- in these approvals or in
22 contracts, if it says, you know, that the -- the
23 default remedies of the secure -- of the
24 management -- you know, the lender has that right
25 under it, that would be something that we would say,

1 "No, you can't do that because that's part of the
2 management contract and those two go together."

3 But if it -- there were occasional
4 times where they would say something about a
5 management contract, and we would let it stay in, but
6 it was one of those -- one of those areas that you
7 had to be extremely careful.

8 And so it was more often than not that
9 if they wanted to go forward with the other
10 contracts, they would -- they would take out any
11 reference to management contract.

12 Q So if I understand what you're saying correctly, a
13 collateral agreement's reference to a management
14 contract does not, per se, invalidate that collateral
15 agreement, true?

16 A True.

17 Q And let me just throw this hypothetical out to you.

18 Contract A --

19 A Um-hmm.

20 Q -- has a default provision that you believe makes
21 Contract A a management contract.

22 A Yes.

23 Q Okay. Contract B makes a reference generically to
24 Contract A. Not to the default provisions, not to
25 the consequences of default, but just makes a

1 reference to Contract A.

2 Is Contract B a management contract?

3 A What's the reference?

4 Q It says that Contract A is enforceable.

5 A Oh. That would be probably one of the first ones

6 that I would suggest that they take out.

7 I mean, those -- those are the kinds

8 of concerns that are raised because are these

9 separate standalone contracts, or are they contracts

10 that are -- that have to stand together?

11 Q And that determination would be one that you would

12 make individually without consulting any case law,

13 statutes, or regulations, true?

14 A It would be something that -- not beyond what had

15 been done originally to come up -- to understand how

16 to do this.

17 Q Do you have a copy of the bond in front of you now --

18 actually, just to make it easier, I'll give you an

19 exhibit here.

20 A Okay.

21 (Exhibit 6 marked for identification.)

22 BY MS. McNALLY:

23 Q Here's Exhibit 6. Keep that to one side. And then

24 your affidavit or your declaration in this case on

25 page 15 at paragraph 55 comments on the bond.

1 Where in the bond does it incorporate
2 the trust indenture's default remedies?

3 A I would say that if you look at the fact that there's
4 many references to the trustee and the indenture, and
5 then you look at the fact that on top of page 3, the
6 bonds of this series are authorized by a bond
7 resolution and trust indenture. And the bonds are
8 equally and ratably secured by the pledged revenues
9 pursuant to the indenture.

10 And "Reference is hereby made to the
11 indenture and bond resolution, and any amendments" --
12 "for a description and limitation of the property,
13 revenues and funds pledged and appropriated to the
14 payment of the bonds, the nature and extent of the
15 security thereby created, the rights of the owners of
16 the bonds, the rights, duties, and immunities of the
17 trustee." And it continues.

18 And then you look down to the bottom
19 of 3, you see "Prior to the date fixed for
20 redemption, funds shall be deposited with the trustee
21 sufficient to pay the bonds called."

22 And then up on top of page 4 it says,
23 "This bond is transferable, as provided in the
24 indenture, only upon the registration records
25 maintained by the trustee under the indenture by the

1 registered owner."

2 And then down to the third-to-last
3 paragraph on 4 it says, "In case an event of default
4 as defined in the indenture occurs, the principal of
5 this bond and all other bonds outstanding may be
6 declared or may become due and payable prior to the
7 stated maturity" -- "and with the effect and subject
8 to the conditions provided in the indenture, but no
9 owner of any bond shall have the right to enforce the
10 provisions of the indenture, except as herewith
11 provided."

12 And then finally, the fact that "The
13 bond is not valid or becomes obligatory for any
14 purpose until it has been authenticated by the
15 execution of the certificate herein endorsed by the
16 trustee under the indenture."

17 I read that altogether to take that
18 position.

19 Q Without necessarily reference to the bonds or the
20 indenture, do you understand the difference between
21 an obligation to repay and security for that
22 obligation to repay?

23 A Yes.

24 Q The bonds are themselves a promise to repay the debt,
25 and the indenture was security for that promise to

1 repay the debt, true?

2 A The indenture seems to be a lot more than just a
3 security, but it is part and parcel of that.

4 MR. TUREK: All right. I'm going to hold
5 the rest of my exam, pending some off-the-record
6 discussion about the letters. I'll pass the baton to
7 Jim.

8 EXAMINATION

9 BY MR. CLARK:

10 Q While we're on the subject of the bond, do you agree
11 that the bond -- which I think -- do you have the
12 bond in front of you?

13 A I have the bond series 2008.

14 Q You agree that the bond does not contain the language
15 that Mr. Turek was discussing with you a while back
16 to the effect of "incorporation by reference" --
17 "hereby incorporated by reference"?

18 Do you see anywhere in the bond that
19 it says that the terms and conditions of the trust
20 indenture are hereby incorporated by reference?

21 A I have not seen those words.

22 (Exhibit 7 marked for identification.)

23 BY MR. CLARK:

24 Q Do you have the agreement there?

25 A Lac du Flambeau Band of Lake Superior Chippewa

1 Indians No. 1 through 8? Is that what you're talking
2 about?

3 Q No, the tribal agreement. It's called the "Tribal
4 Agreement."

5 A Yeah.

6 Q Do you see anywhere in the tribal agreement where it
7 says anything to the effect that the terms and
8 conditions of the indenture are incorporated by
9 reference into the tribal agreement?

10 A Are you looking for those exact words, or are you
11 looking for --

12 Q Or words that come close to that.

13 A "The tribe here absolutely and unconditionally
14 guarantees the trustee the payment of the
15 obligation."

16 Q Are you saying that you believe those words are the
17 equivalent of incorporating by reference the terms
18 and conditions of the trust agreement?

19 A That is part of it.

20 The entire -- if you'll look at B, C,
21 D, E, F, G, H, they all talk about the trust
22 agreement, including -- like, in, for instance, H,
23 "All remedies according to the trustee, by reason of
24 this agreement, are separate and cumulative" --

25 Q Let me interrupt you for a second.

1 I recognize that there are provisions
2 in there that talk about the trust agreement.

3 What I'm asking you is: Is there
4 anything in that document that you can point me to
5 that says that the terms and conditions of the
6 indenture are incorporated by reference in that
7 document?

8 A If you're asking are those exact words in there, no.
9 The answer is no.

10 Q And other than -- okay. And other than the
11 provisions that -- is it your testimony that you view
12 those provisions that you've previously mentioned and
13 that you include in your report or your affidavit as,
14 in your mind, being the equivalent of incorporating
15 the terms and conditions of the indenture into the
16 tribal agreement?

17 A Just so that I don't get confused, which section were
18 we looking at in the --

19 Q Well, you named just a minute ago a number of
20 different provisions in the tribal agreement when I
21 asked you the question of whether the terms and
22 conditions of the indenture were incorporated by
23 reference into the tribal agreement.

24 In response to that question, you
25 rattled off a number of different provisions in the

1 tribal agreement that you made reference to in
2 response to my question.

3 Do you recall that?

4 A Yes, I recall that.

5 Q All right. And what I'm asking you is: Is it your
6 testimony that you -- in your view, that those
7 provisions are the functional equivalent of expressly
8 incorporating into a document the terms and
9 conditions of another document?

10 A It's my testimony that the -- that -- well, for one
11 thing, we started talking about "incorporation by
12 reference" probably a lot more than is appropriate.

13 Q Why do you say that?

14 A Well, because the concept is more that these --
15 that -- you know, in some instances -- like the
16 default remedies, in particular, will become a remedy
17 of the other agreement. That's very common
18 throughout these.

19 But the other is, is that the
20 documents are -- they don't -- they don't stand
21 alone. They are documents that are dependent upon
22 each other. This tribal agreement is dependent upon
23 having a trustee and --

24 Q And that concept you're talking about, that's the
25 concept that was developed while you were at the

1 NGIC; is that correct?

2 A NIGC, yes.

3 Q NIGC.

4 A Yes.

5 Q If you'd look at paragraph 8 -- I'm sorry, page 8,
6 paragraph 27.

7 A Okay.

8 Q Paragraph 27 you're talking about the -- reviewing
9 contracts containing the indicia of management.

10 A Um-hmm.

11 Q And then you talk about the declination process. And
12 then you refer to the decision by the Eastern
13 District of Wisconsin in the Wells Fargo matter.

14 A Yes.

15 Q Now, are you aware of the fact that the Eastern
16 District decision in the Wells Fargo matter was
17 appealed to the Seventh Circuit?

18 A Yes.

19 Q And there was a Seventh Circuit decision on all this,
20 correct?

21 A Yes.

22 Q Why did you not cite the Seventh Circuit decision as
23 opposed to citing the Eastern District decision?

24 A If I remember right, they're still referring to that
25 in the letters.

1 Q The commission is still referring to the Eastern
2 District decision in their letters?

3 A Yes.

4 Q And they're doing that even though there was a
5 Seventh Circuit decision that, at least in
6 significant part, overruled the Eastern District
7 decision?

8 A Well, I'm not going to get into whether or not they
9 overruled it, but I do know that the lower court
10 talked about a receiver. And it seemed to me that
11 the Seventh Circuit decided to not reach that
12 decision.

13 And the Seventh Circuit decision -- I
14 don't know, and I haven't asked, why they didn't
15 change the reference. I would have to actually
16 double-check to make sure they haven't.

17 Q And was that true while you were the person writing
18 the opinions before you left the agency; even though
19 the Seventh Circuit decision had been rendered, you
20 still referred to the --

21 A No, I don't think the --

22 Q -- the Eastern District decision?

23 A I don't think that the Seventh Circuit decision had
24 been rendered.

25 Q You were gone before that decision was rendered?

1 A Yes, because Wells -- the lower court decision was
2 issued in 2010, and that's when I left.

3 Q Okay. But your understanding is that the commission
4 continues to refer to the Eastern District decision,
5 notwithstanding the appeal on the decision of the
6 Seventh Circuit?

7 A Like I said, I don't remember double-checking that
8 particular thing. That can be checked on the website
9 very easily, but that would -- certainly, the
10 receiver part of that analysis was something that --
11 and as you see, found persuasive.

12 Q Now, are you aware of the fact that in the
13 Seventh Circuit decision, which was the appeal from
14 this Eastern District decision that's referenced in
15 your declaration, that one of the things that the
16 Seventh Circuit said was that the mere reference to a
17 related management contract does not render a
18 collateral document subject to the act's approval
19 requirement?

20 Are you aware of that holding by the
21 Seventh Circuit?

22 A I remember language somewhat to that effect.

23 Q Okay. Do you know whether or not, in light of that
24 language, the commission has undertaken any
25 reasonably definitive research on the question of the

1 difference between referring to a management contract
2 and actually incorporating the terms of the
3 management contract into another document?

4 A I do not know.

5 Q In the Seventh Circuit opinion, another thing they
6 say in a footnote, Footnote 13, they said that it
7 appears that through its regulatory authority, the
8 commission should undertake the task at some point in
9 order to give entities that it regulates more certain
10 guidance as to the permissible scope of financing
11 agreements.

12 Do you recall that portion of the
13 Seventh Circuit opinion?

14 A Yes.

15 Q Why was it that there was no regulation that gave
16 anyone an indication of what would or would not be
17 considered management under the operative rules?

18 A Why?

19 Q Yes. Why were there no -- why are there no
20 regulations? If you could tell me from your
21 perspective, why did that not happen while you were
22 at the commission?

23 A We spent a lot of our time writing regulations. That
24 was just not one of the ones that had risen to the
25 top as far as importance.

1 The NIGC writes minimum internal
2 control standards. They should be changed about once
3 every two years. If you've ever seen a minimum
4 internal control standard, they are extraordinarily
5 lengthy. And when it came to regulatory writing
6 resources, they tended to focus on that.

7 There wasn't a big call by the outside
8 community to write regulations. And, you know,
9 agencies have to focus their resource where the
10 demand is.

11 Q Could you turn to paragraph 14 of your declaration.

12 A Okay.

13 Q That's the one that starts out, "For example, a
14 typical set of agreements submitted to the NIGC for
15 review and approval will include a management
16 contract, a loan agreement, and a development
17 agreement."

18 Do you see that?

19 A What number was it again? I'm sorry.

20 Q Fourteen.

21 A Oh, No. 14 or page 14?

22 Q I'm sorry. If I said page 14, I meant paragraph 14.

23 A Okay. Okay.

24 Q Do you see that first sentence --

25 A Yeah.

1 Q -- I just read?

2 A Yes.

3 Q And then you go on to say, "The parties that are
4 seeking management contract approval are careful to
5 assure that the loan and development agreements can
6 stand alone and not provide for any management of the
7 gaming enterprise, and thus do not require NIGC
8 approval."

9 Do you see that?

10 A Yes.

11 Q So you recognize that, at least in most cases,
12 parties that are seeking management contracts will
13 take steps to try to ensure that that's the case,
14 correct?

15 A Yes.

16 Q And if they do that; namely, if the loan and
17 development agreements can stand alone, then they --
18 you agree they don't require NIGC approval, correct?

19 A Yes. And what we're talking about, of course, is
20 that they don't have any management in them; they're
21 not dependent upon the management agreement.

22 Q Right.

23 A Yeah.

24 Q They're not -- assuming they're not management
25 contracts, correct?

1 A Well, yes and no. I mean, as we've discussed with
2 respect to these contracts --

3 Q Wait a minute. I'm asking about paragraphs in your
4 affidavit.

5 A Right.

6 Q Now, let's stick to paragraph -- with the language in
7 paragraph 14 of your affidavit. I'm trying to
8 understand this.

9 You say, "The parties that are seeking
10 management contract approval are careful" -- and I
11 assume that means in most cases, from your
12 perspective -- "to assure that the loan and
13 development agreements can stand alone," correct?

14 A Right.

15 Q All right. And not provide for management, correct?

16 A Right.

17 Q So you recognize that loan agreements can be drafted
18 that can stand alone and not provide for management,
19 correct?

20 A Yes.

21 Q And you recognize that development agreements can be
22 drafted that can stand alone and not provide for
23 management, correct?

24 A Right.

25 Q And if this happens, if the management agreement is

1 drafted in a way that -- strike that.

2 If the loan agreement is drafted in a
3 way that it does not provide for management, then you
4 recognize in the last sentence that the parties could
5 proceed on a loan agreement, even though the
6 management contract was still pending approval,
7 correct?

8 A If it can stand alone.

9 Q Correct. Yeah. And if the -- if the development
10 agreement can stand alone, in that it doesn't provide
11 for management, then --

12 A This is an "and," not a --

13 Q If the development agreement can stand alone and does
14 not provide for management, then you recognize that
15 the parties can proceed with that development
16 agreement, even though the management contract, which
17 is part of the transaction, is still pending approval
18 by the commission --

19 A Yes.

20 Q -- correct?

21 A Yes.

22 Q Could you go to paragraph 18 of your affidavit.

23 A Okay.

24 Q In paragraph 18 you talk about what you referred to
25 as the "NIGC policy" --

1 A Yes.

2 Q -- insofar as what management encompasses, correct?

3 A Yes.

4 Q Then you go on to say a little bit later in that
5 paragraph, "A contract does not have to require that
6 the contractor manage all aspects of the operation."

7 Do you see that?

8 A Yes.

9 Q If the contractor manages any aspect of the gaming
10 operation, then, in your view, the contract is
11 subject to NIGC approval; is that correct? Is that
12 what you're saying?

13 A Yes.

14 Q Okay. So is it your view that -- well, you're saying
15 it's subject to NIGC approval, meaning that it
16 would -- when you say "subject to NIGC approval,"
17 what do you mean by that phrase?

18 A That means that the chairman has to approve the
19 contract.

20 Q Okay. And it doesn't necessarily mean that the
21 chairman wouldn't approve the contract, does it?

22 A No. It just means that it has to be approved in
23 order to not be void.

24 Q And whether or not it has to be approved in order not
25 to be void would depend on whether it's actually a

1 management contract or not, correct?

2 A Yes.

3 Q So was it your view when you were at the agency that
4 any contract that managed any aspect of a gaming
5 operation, no matter how trivial, that that would --
6 that that would require NIGC approval?

7 A Well, it wasn't just my view. The NIGC issued
8 notices of violation. I think they had a final
9 agency action --

10 Q Well, we're talking about your view here. Is that
11 your view?

12 A Well, obviously, I take my view from what the agency
13 decides, yes -- or I did when I was there, yes.

14 I think it's actually in the
15 regulations also.

16 Q Where in the regulations does it say that a contract
17 that manages any aspect of a gaming operation, no
18 matter how trivial that might be, is subject to NIGC
19 approval?

20 A I'm sure it does not use the word "trivial" in it.

21 Q Which regulation are you referring to that you would
22 point me to to support that statement?

23 A I will look in 533 to see if it is there. I know
24 it's "all" or "part" is the language.

25 It's not -- it doesn't appear to be in

1 533, but I do know it's in the regulations somewhere.

2 It's the "all" or "part" language --

3 Q Is there anything you would look at, because I would
4 very much like to know what it is that you would
5 point to as support for that.

6 MS. HOGEN MOLINE: I'm just trying to pull
7 up the regulation.

8 BY MR. CLARK:

9 Q If you can't easily think of it sitting here today,
10 why don't we do this: Why don't you -- if you think
11 of it at some future time, just let your counsel
12 know --

13 A Okay. Because I know the language is there.

14 Q -- and they can pass it on to us, all right?

15 A Okay.

16 Q If you'd go to paragraph 21.

17 A Okay.

18 Q In that, you describe the process, the declination
19 process. We've gone over that in some detail
20 previously, so I don't intend to cover old ground
21 here hopefully, but you refer to the fact that if the
22 parties have provisions in a particular agreement
23 that you were to conclude was an indicia of
24 management or, in your opinion, made it a management
25 contract, then you would give the parties an

1 opportunity to remove that offending provision; is
2 that correct?

3 A Yes.

4 Q All right. And if the offending provision that you
5 felt -- or provisions that you felt made it a
6 management contract were removed, then you would
7 issue the -- the declination opinion, correct?

8 A Yes.

9 Q And that declination opinion would, in essence, be
10 that the submitted contract, in your opinion, didn't
11 constitute a management agreement that was subject to
12 NIGC approval; is that correct?

13 A Yes.

14 Q And do I remember correctly that I saw at one point
15 that this is referred to as an advisory opinion?

16 A Yes.

17 Q And why is it referred to as an advisory opinion?

18 A Because it's -- it's equivalent to if you were lucky
19 enough to have a criminal prosecutor say, "If you do
20 this, you will be violating the law," something like
21 that.

22 It's providing advice so that the
23 parties can go forward without concern that the NIGC
24 is going to conclude that they are violating the law.

25 Q Is it binding on the NIGC? Is it binding on the

1 chairman?

2 A No.

3 Q So when you say, "so the parties can proceed without
4 concern," how can the parties proceed without concern
5 if the opinion that's being issued as part of this
6 process is not binding on the chairman?

7 A Probably because the chairman has never brought an
8 action against someone who submitted all of the
9 contracts that needed to be submitted and were
10 reviewed by the OGC and never, then, proceeded with
11 action.

12 Q So there's some level of comfort that if the opinion
13 is issued that the chairman won't go against the
14 opinion. Is that what you're saying?

15 A Right.

16 Q But you would agree that there is nothing legally, by
17 virtue of the fact that you issued the opinion, that
18 would prevent the chairman, if certain -- if the
19 chairman, for various reasons, might have a different
20 point of view down the road, from taking the position
21 that it was a management contract; is that correct?

22 A That's correct.

23 Q And you -- if the chairman did that, I assume the
24 commission would take the position that the letter
25 that was issued was just an opinion. It was an

1 advisory opinion. It wasn't a conclusive statement
2 that was binding on the chairman that this was not a
3 management contract.

4 A That's correct.

5 Q You would agree with me that if a party chose to do
6 this, there's nothing that would require them to
7 submit any documents in connection with the
8 transaction to the commission, if they were
9 reasonably confident that they weren't management
10 contracts, correct?

11 A That's correct.

12 Q And, of course, they're taking a risk if they do that
13 that someone might later determine that it was a
14 management contract, but there's nothing that
15 requires them to get that advanced review or
16 approval; is that correct?

17 A That's correct.

18 MR. CLARK: If it's all right, I guess this
19 would be a good time to break. I don't have too much
20 more. So if you could work out the document issues,
21 and I can take my call.

22 In the meantime I'll try to organize
23 my thoughts here a little bit, and I would think we
24 can -- at least in terms of anything I have, can
25 finish up pretty soon when I get back.

1 THE WITNESS: Jim, the definition of
2 management contract, 502.15.

3 MR. TUREK: 25 CFR.

4 MR. CLARK: Hold that there. I'll ask you
5 about that when I get back.

6 THE WITNESS: Okay.

7 (A break was taken at 4:11 p.m.)

8 (Back on the record at 4:18 p.m.)

9 (Exhibit 8 marked for identification.)

10 EXAMINATION

11 BY MR. TUREK:

12 Q All right, Ms. Coleman. I just have a few questions
13 for you about some letters that we obtained related
14 to your time at the National Indian Gaming
15 Commission.

16 The first document I'm going to show
17 you is Exhibit 8.

18 A Okay.

19 Q This is a letter dated May 7, 2008, from you to
20 Mr. Justin Weinberg at a law firm in Minnesota,
21 correct?

22 A Yes.

23 Q Is this a true, accurate, and authentic copy of that
24 May 7th letter to Mr. Weinberg?

25 A I believe so.

1 Q And that's your signature at the very end of the
2 agreement, correct?

3 A Yes.

4 Q This letter is a public record, true?

5 A Yes.

6 Q It's subject to the Freedom of Information Act?

7 A Yes.

8 Q In fact, often you would reference that at the
9 conclusion of these letters, correct?

10 A Yes.

11 Q You prepared this letter as part of your duties as
12 acting general counsel for the NIGC, correct?

13 A Yes.

14 Q This letter sets out the activities performed by you
15 in your capacity as general counsel for NIGC, true?

16 A Yes.

17 (Exhibit 9 marked for identification.)

18 MR. JACQUART: Perhaps we can stipulate
19 that the same set of questions applies to each.

20 MR. TUREK: All right. Well, I'm going to
21 do this one of two ways: I'm going to get a
22 stipulation that they can be admitted, and I'm not
23 going to ask all these questions. Or I'm going to go
24 through the process of getting these buttoned up.

25 So pick it.

1 MR. JACQUART: Question away.

2 BY MR. TUREK:

3 Q Okay. Ms. Coleman, I'm going to show you what's been
4 marked as Exhibit No. 9.

5 A Okay.

6 Q This is a true, accurate, and authentic copy of a
7 letter from you to Mr. Michael Roy and Jerome
8 Miranowski, dated February 19, 2009, correct?

9 A Yes.

10 Q That's your signature on the second page?

11 A Yes.

12 Q This document was prepared by you within the scope of
13 your duties as acting general counsel of NIGC,
14 correct?

15 A Yes.

16 Q This letter sets out the activities you performed
17 while acting general counsel of NIGC, correct?

18 A Yes.

19 (Exhibit 10 marked for identification.)

20 BY MR. TUREK:

21 Q Ms. Coleman, I'm going to show you what's been marked
22 as Exhibit 10.

23 Exhibit 10 is a true and correct and
24 authentic copy of a letter from you, dated
25 September 1, 2009, correct?

1 A Pardon me?

2 Q Exhibit 10 is a true, accurate, and authentic copy of
3 a letter authored by you, dated September 1, 2009,
4 correct?

5 A Yes.

6 Q That's your signature on the last page?

7 A Yes.

8 Q And this letter sets out the activities you performed
9 within the scope of your duties as acting general
10 counsel of NIGC, correct?

11 A Yes.

12 (Exhibit 11 marked for identification.)

13 BY MR. TUREK:

14 Q Ms. Coleman, I'm going to show you what's been marked
15 as Exhibit 11.

16 Do you have Exhibit 11 in front of
17 you, Ms. Coleman?

18 A Yes.

19 Q This is a letter -- strike that.

20 This is a true, correct, and authentic
21 copy of a letter from you, dated February 22nd, 2010,
22 to Mr. Beauty and Ms. Parada, correct?

23 A Yes.

24 Q And that's your signature on the last page?

25 A Yes.

1 Q And Exhibit 11 sets out the activities you performed
2 in your capacity as general counsel for NIGC,
3 correct?

4 A Yes.

5 (Exhibit 12 marked for identification.)

6 BY MR. TUREK:

7 Q Ms. Coleman, do you have Exhibit 12 in front of you?

8 A Yes.

9 Q This is a true, accurate, and authentic copy of a
10 letter from you to Mr. Kent Richie, dated
11 February 22nd, 2010, correct?

12 A Yes.

13 Q That's your signature on the last page, yes?

14 A Yes.

15 Q And this letter also sets out the activities
16 performed by you in your capacity as acting general
17 counsel for the NIGC, true?

18 A Yes.

19 (Exhibit 13 marked for identification.)

20 BY MR. TUREK:

21 Q Ms. Coleman, do you have Exhibit 13 in front of you?

22 A Yes.

23 Q This is a true, accurate, and authentic copy of a
24 letter from you, dated March 19, 2010, correct?

25 A Yes.

1 Q This is your signature on the last page of the
2 letter?

3 A Yes.

4 Q And this letter sets out your activities as acting
5 general counsel of the NIGC, true?

6 A Yes.

7 (Exhibit 14 marked for identification.)

8 BY MR. TUREK

9 Q Ms. Coleman, in front of you is Exhibit 14.

10 Exhibit 14 is a true, accurate, and
11 authentic copy of a letter from you, dated April 2nd,
12 2010, correct?

13 A Yes.

14 Q That's your signature on the last page of the
15 document?

16 A Yes.

17 Q And this document, this letter, sets out your
18 activities as acting general counsel of NIGC, true?

19 A Yes.

20 (Exhibit 15 marked for identification.)

21 BY MR. TUREK:

22 Q Ms. Coleman, do you have Exhibit 15 in front of you?

23 A Yes.

24 Q This is a true, accurate, and authentic copy of a
25 letter from you, dated May 27, 2010, correct?

1 A Yes.

2 Q This letter has your signature on page 12, correct?

3 A Yes.

4 Q And this letter sets out your activities as acting
5 general counsel for NIGC, true?

6 A Yes.

7 Q All of the letters that we've gone through, which
8 were Exhibits 8 through 15, were letters you drafted
9 as part of your duties as acting general counsel of
10 the NIGC, correct?

11 A Yes.

12 MR. TUREK: Those are all the questions I
13 have. Thank you.

14 (A discussion was held off the record.)

15 (Exhibits 16-17 marked for identification.)

16 MR. TUREK: I'm going to withdraw 17.

17 BY MR. TUREK:

18 Q Ms. Coleman, I've put in front of you Exhibit No. 16.
19 It's a letter dated March 10, 2011.

20 Have you had a chance to look at that?

21 A No.

22 Q I'll give you a couple minutes. Take as long as you
23 need to take a look at it.

24 A Okay.

25 Q Earlier in today's deposition -- I believe it was

1 early on in today's deposition -- you mentioned there
2 being a change in the approach on certain issues in
3 declination letters from when you were there until
4 after you left.

5 Do you remember that testimony?

6 A Yes.

7 Q And I believe you even referenced a declination
8 letter that reflected that change in approach after
9 you left the agency.

10 Is Exhibit 16 --

11 A No.

12 Q -- the letter you were referencing?

13 A No.

14 Q Do you know approximately the date that the
15 declination letter that you were referencing was
16 authored?

17 A Probably -- well, it's the 2012 and 2013 letters that
18 still use pretty much the same standard language that
19 is in all the other declination letters, but it -- it
20 concludes that -- could be that receivership is no
21 longer a generic available remedy.

22 So it's -- this is really a document
23 that looks like it was part of an enforcement action.
24 You know, it's the field investigators who pulled
25 together -- pulled together the agreements.

1 There had been an October '09 letter
2 probably from me saying that these constituted
3 management. And it looks like they didn't do
4 anything about it, and -- until they -- well, no, no.

5 I guess in the very first place, it
6 was the enforcement people looking at it, and then
7 they -- the acting general counsel was probably
8 relooking at them, and then -- and notifying them
9 that we saw a problem with it. They made changes,
10 and looks like there was then some back and forth.
11 And ultimately the then general counsel determined
12 that the contracts were not management contracts.

13 Q Was Lawrence Roberts your successor --

14 A Yes.

15 Q -- at the commission?

16 And on page 2 there's some reference
17 here to "pledged revenues."

18 And you had previously opined that
19 having gross gaming revenues pledged as part of a
20 security arrangement was indicia of management,
21 correct?

22 A Correct.

23 Q Here Mr. Roberts points out that if the priority is
24 given to operating expenses, that addresses the
25 management concerns. Do you see that?

1 A Yes.

2 Q Do you agree with that conclusion by Mr. Roberts?

3 A In the context of what I'm reading here. You know,
4 you can't know what else is in a document, but
5 certainly, they seem to think that there is no longer
6 an ability to have a receiver, that the pledged
7 revenues no longer -- that the -- that there's no one
8 who can take over the operating expenses, that they
9 can't direct it.

10 So that's why those changes are --
11 alleviate the concerns.

12 Q How about you? Do you agree with that conclusion,
13 that by making the changes that were made to how
14 pledged revenues were handled, that that alleviates
15 the concern about management?

16 A Assuming that this is all there is to it, yes.

17 Q Were there differences of opinion from time to time
18 among the attorneys at the NIGC as to whether certain
19 components of an agreement constituted management
20 indicia?

21 A Well, certainly there was a lot of back and forth
22 among whoever was working on them as to what the
23 language said and whether it had -- it showed
24 control, so...

25 Q And so there would be a discussion between the

1 lawyers at the commission; one may take a certain
2 position, another lawyer may take a different
3 position, but ultimately it was your call on whether
4 these were management concerns?

5 A Yes.

6 MR. TUREK: Those are all the questions I
7 have about Exhibit 16. And I think that's all I
8 have, pending Jim's additional questions.

9 (A break was taken at 4:40 p.m.)

10 (Back on the record at 4:52 p.m.)

11 EXAMINATION

12 BY MR. CLARK:

13 Q Okay. Before we broke, I think I was asking you
14 questions about paragraph 18 of your affidavit, and
15 particularly the statement about managing any aspect
16 of a gaming operation. Do you see that?

17 A Um-hmm.

18 Q And I had asked you for the basis for that statement,
19 and you referred me, following the break that we just
20 took, to CFR 502.15; is that right?

21 A Yes.

22 Q Okay. And other than that, did you have anything
23 else in mind in the way of regulatory or statutory
24 authority for that statement?

25 A No. I know that there were -- I believe there was an

1 NOV and possibly a commission decision on -- that
2 uses that language.

3 Q And I think we've established from prior questions
4 that with regard to the question of what it means to
5 manage or to constitute management, that has not been
6 specifically defined in any regulation; is that
7 correct?

8 A It's been defined in a final agency action.

9 Q I'm asking you about a regulation.

10 A Not a regulation.

11 Q And no statute, correct?

12 A No statute.

13 Q If you would turn to page 56 -- I said "page" again.
14 I mean paragraph 56.

15 A Okay.

16 Q There you're referring to the bond purchase
17 agreement. Do you see that?

18 A Yes.

19 Q You're talking about a blanket lien on the
20 corporation's assets, and then you say, "As in the
21 other documents, this lien evidences control over the
22 corporation's assets and thus authorizes management
23 of the gaming operation."

24 Do you see that?

25 A Yes.

1 Q Is it your view that a lien on any asset of the -- of
2 a tribe or a tribal corporation constitutes
3 management of a gaming operation?

4 A No.

5 Q So what is it that differentiates what assets taking
6 the lien on would constitute management and a lien on
7 which assets would not?

8 A This lien is a lien on everything the corporation
9 has. Everything. And it allows the trustee, the
10 bondholders, a receiver to -- any of those to control
11 that -- those assets.

12 By controlling those assets, they are
13 running, they are managing, the gaming operation --

14 Q I don't mean to interrupt you, but you're answering a
15 different question than I asked you.

16 I asked you with regard to -- in
17 general, what differentiates a lien on certain assets
18 apparently, as you indicated in your view, being a
19 management -- constituting management and certain
20 assets not?

21 Where -- what's the distinction?

22 A If the lien doesn't include control over the -- the
23 operating expenses and the capital expenditures, that
24 would often be -- that would mean that there wouldn't
25 be that control of the manager -- management of the

1 facility.

2 Q So, for example, a lien on equipment, would that
3 be -- would you deem -- in your view, would you deem
4 that a management contract?

5 A Probably not.

6 Q Has the view of the agency with regard to language
7 concerning liens on revenue, in terms of whether or
8 not it is a management contract, changed somewhat
9 since you left the agency?

10 A Only in the sense that they seem to be taking a more
11 clear statement that a receiver is no longer an
12 available remedy under law for people who are
13 attempting to enforce obligations --

14 Q Other than that, have you seen a change?

15 A No.

16 Q When you were at the agency, did you take the
17 position that a lien on gross revenues was a
18 management contract, unless it excepted out
19 expenses --

20 A Expenses --

21 Q -- of the corporation?

22 A Yes.

23 Q Have you seen any more recent management letters
24 since you left that simply required that the lender
25 give priority to management expenses and not require

1 that they be net on the management expenses?

2 A Well, yes, when I was looking at the -- actually,
3 that was one that I signed. And I believe that the
4 way we addressed it was by giving priority; in other
5 words, making sure that the operating expenses were
6 not impacted, that the casino wasn't impacted, that
7 the tribe remained in control of the -- running the
8 casino. Then they could -- they could go ahead and
9 have a loan like that.

10 I think that those two examples are
11 really very much the same thing.

12 Q You don't see any distinction?

13 A Not really, no.

14 Q Getting back to paragraph 56 again, you say that the
15 document has a blanket lien on all the corporation's
16 assets --

17 A Yes.

18 Q -- you refer to Sections 9(i)(5) --

19 A No, this is the one --

20 Q This is the one where you, then, refer -- went back
21 to Section 6.

22 A Yes.

23 Q We've gone over that.

24 So you have indicated, I think, in
25 prior questions where in the bond purchase agreement

1 you believe that alleged blanket lien can be found;
2 is that correct?

3 A Yes.

4 Q Okay. Did you have any discussions, to the best of
5 your knowledge, with anybody associated with the
6 tribe or purporting to represent the tribe in
7 connection with the tribe's anticipated decision not
8 to continue making payments on the bonds in
9 connection with this transaction?

10 A Not that I remember, no.

11 Q Do you have any knowledge or recollection of anybody
12 else associated with the NIGC having had any
13 conversations with anybody associated with the tribe
14 or the EDC with regard to the potential default on
15 the bonds?

16 A Not that I remember, no.

17 Q Subsequent to the Seventh Circuit decision in the Lac
18 du Flambeau case, I understand that in terms of
19 policy or practice, there's evolved what's referred
20 to as "safe harbor language"?

21 A Yes.

22 Q And is that in response, at least in part, to the
23 Seventh Circuit decision?

24 A No. The language was developed before the
25 Seventh Circuit --

1 Q What is the safe harbor language?

2 A It's language intended to clarify that there's no
3 intention to -- to manage in -- by specifically
4 saying that -- that the contractor won't determine
5 budget, determine operating expenses.

6 There's a lot of other language, but
7 those are the important ones.

8 Q And if the parties to that transaction accept that
9 language, then by "safe harbor," what is the --
10 what's the consequence or meaning of that?

11 A Well, then it makes clear that if there's other very
12 generic language, like "and the contractor can" -- or
13 "lender can, you know, have" -- "avail itself of any
14 available remedies under law or maybe under the UCC,"
15 it will -- it will make clear that you have -- that
16 even though there's a possibility of a receiver under
17 available remedies under the UCC, that -- that a
18 receiver is not -- cannot -- cannot touch the
19 operating expenses and --

20 Q I don't mean to interrupt you, but I think you
21 misunderstood my question again.

22 My question is: Assuming that a --
23 let's use the example of a lender --

24 A Um-hmm.

25 Q -- agrees to those safe harbor provisions, what's the

1 effect of that?

2 A They're much more likely to get a declination letter.

3 Q So, in general, if the terms and conditions of the
4 safe harbor provisions that are currently being used
5 by the commission are agreed to, then, in general,
6 it's likely that the -- that the parties will get a
7 declination letter or, in other words, an advisory
8 opinion that it doesn't need management -- it doesn't
9 need approval of the management contract --

10 A Yes.

11 Q -- correct?

12 A Yes.

13 Q When was that general policy adopted, approximately?

14 A In January '09, we wrote a letter to Kent Richie of
15 Faegre & Benson, who was often before us as counsel
16 for both sides on agreements. And we were attempting
17 to assist the parties to come up with a way to
18 develop these agreements without having to worry
19 about very, you know, general provisions, arguably
20 the management, you know, making it clear that
21 they're not going to be able to manage.

22 And they were more specific than --
23 than the generic language that used to be in a lot of
24 contracts, which is just, "Well, this is not a
25 management contract, and we don't intend to manage."

1 Q And that safe harbor process has been generally in
2 place since that time?

3 A Yes.

4 Q If the parties came to the commission with a
5 transaction, financial transaction, involving a note
6 and a mortgage, and for the sake of my question
7 assuming that the mortgage, in your view, had
8 provisions in it that made it a management
9 contract --

10 A Yes.

11 Q -- if the parties nevertheless decided to proceed
12 with the transaction with just the note and not the
13 mortgage, would you agree with me that -- and
14 assuming the mortgage -- the note did not have any
15 provisions in it that made it a management contract,
16 you would agree with me that there would be nothing
17 inappropriate or illegal about that transaction; is
18 that correct?

19 A Well, assuming it has no management in it, assuming
20 that it stands alone, you're essentially talking
21 about a lending agreement, that can be done.

22 Q And you recognize there can be an independent promise
23 to pay an obligation that wouldn't -- even if it was,
24 at least at one point, part of a transaction that
25 had -- another agreement that had management

1 provisions in it, that that -- that there can be
2 circumstances under which one can proceed to enforce
3 a separate independent promise to pay, correct?

4 A I'm not real sure what you're getting at. But if
5 what you're getting at is, is if they formed the
6 contract so that it's no longer part of the other
7 contract, yes.

8 Q Now, you said that you left the agency before the Lac
9 du Flambeau Seventh Circuit decision was rendered; is
10 that correct?

11 A Yes. I'm quite sure of that.

12 Q So would it be a fair statement that the analysis
13 that was used by the Seventh Circuit in the Lac du
14 Flambeau decision to determine whether or not the
15 indenture was a management contract was not something
16 that you took into consideration in connection with
17 any of the opinions that you prepared while you were
18 at the commission? Is that correct?

19 A The question is, did I rely on the Seventh Circuit
20 opinion to make --

21 Q Did you rely on the rationale of the Seventh Circuit
22 opinion that the Seventh Circuit used in determining
23 whether or not it was a management -- whether or not
24 the trust indenture was a management contract, did
25 you rely on that particular rationale for purposes of

1 any of the opinions that you issued while you were at
2 the agency?

3 A You know, I don't know what rationale you're talking
4 about.

5 We had before us the lower court
6 decision, and the NIGC's opinions reflect that they
7 generally agreed with that.

8 Q I think you would agree with me, though, that that
9 decision was overruled, at least in part, by the
10 Seventh Circuit; is that correct?

11 A I understand that the court -- the most important
12 issue to me -- the courts do not need to reach
13 receiver discussion. And I would say that the NIGC
14 continues to -- to view a receiver as management in
15 the context of that kind of case.

16 Q Well, let me just test a little bit what you know
17 about the Seventh Circuit decision.

18 Did the Seventh Circuit decision
19 overrule the district judge with respect to the
20 district judge's finding that because the trust
21 indenture was void, that all the rest of the
22 documents in the transaction were also void?

23 A As I remember, that was remanded back to the circuit
24 for a further determination on whether the rest of
25 the documents were also void.

1 Q So at least insofar as the decision that all the
2 documents -- the decision by the district judge that
3 all the documents were void, that was overturned by
4 the Seventh Circuit and remanded for further
5 proceedings. You're -- is that your understanding?

6 A That's my understanding.

7 Q Okay.

8 MS. HOGEN MOLINE: We've got to catch a
9 plane here.

10 MR. CLARK: Yeah, I said I would be done by
11 5:30, and I will be.

12 THE WITNESS: Let's do it a little faster
13 than that.

14 MR. CLARK: Yeah, well, we've got a few
15 things we've got to get through here.

16 THE WITNESS: Okay.

17 BY MR. CLARK:

18 Q Are you familiar with -- do you recall the analysis
19 the Seventh Circuit used or the thought process it
20 went through to determine whether or not the
21 indenture was a management contract?

22 A I can't remember specifically. I would have to look
23 back at it.

24 Q Do you know whether or not the agency today factors
25 into its determination as to whether or not something

1 is or is not a management contract based upon the
2 approach that the Seventh Circuit used in deciding
3 the Lac du Flambeau decision?

4 A I don't know.

5 Q Did the approach used by the Lac du Flambeau -- by
6 the Seventh Circuit in the Lac du Flambeau decision
7 play any role in the formation of any of your
8 opinions that's contained in the affidavit that we
9 marked as Exhibit 2?

10 A I'm sure I read it -- well, I don't know when -- I
11 don't even remember when it was decided.

12 When was it decided?

13 Q It was decided in September of 2011.

14 A Then I'm sure I read it.

15 Q My question wasn't whether you read it or not. I
16 guess I would have thought you would have read it.

17 But did it play any specific role in
18 any of the opinions that you've reached in your
19 affidavit marked as Exhibit 2?

20 A I would say that I took a broader approach, more akin
21 to the approach that I would expect the district
22 court to take upon remand.

23 Q So you -- you projected ahead as to what you
24 personally thought might happen on remand, and that's
25 the way you primarily looked at it; is that correct?

1 A Well, I used the NIGC -- I was looking at this as
2 what is the NIGC going to do. And the NIGC has
3 continued, as I said, to view the receiver provision
4 as being important to the analysis.

5 Q So getting back to my question, then, would it be
6 fair to say that the decision of the Seventh Circuit
7 in the Lac du Flambeau matter, in terms of how they
8 went about reaching their conclusions, didn't play
9 any significant role in the development of your
10 opinions that are represented in Exhibit 2?

11 A Well, it certainly did in the sense that it continued
12 to uphold the district court on major provisions in
13 that on -- some of the provisions were sent back. So
14 there didn't seem to be any real inconsistencies
15 between the two, as I remember.

16 Q Okay. Can you point me to any -- is there anything
17 in the Seventh Circuit decision that, sitting here
18 today, you can identify as having played any
19 significant role in the formation of your opinions in
20 Exhibit 2?

21 A I don't remember the -- what specifically is in the
22 Seventh Circuit decision so that I can point to it
23 without reviewing the decision again.

24 Q So I take it sitting here today, you can't point me
25 to anything in the Seventh Circuit decision that's

1 played any role in any of the formations -- in the
2 formation of any of your opinions in Exhibit 2?

3 A As I said, I don't remember the -- all of the
4 specific provisions in there. I imagine I could.

5 If you want me to sit there and read
6 it and go through it and say, "yes, you know, this is
7 what I" -- "consistent with" -- "and when I saw this,
8 I thought, well, it's consistent with the thinking
9 that's been going on" -- you know, I don't see the
10 affidavits, the Seventh Circuit opinion, the lower
11 court opinion as being inconsistent with each other.

12 Q That wasn't my question.

13 My question is: Sitting here today,
14 you can't point me to anything with respect to the
15 Seventh Circuit opinion that played --

16 A Not without looking directly at it.

17 Q -- that played any significant role in the formation
18 of your opinions in Exhibit 2; is that correct?

19 A Not without looking directly at the circuit opinion.

20 MR. CLARK: All right. That's all I have.

21 MS. McNALLY: Thank you for your time.

22 (Deposition concluded at 5:17 p.m.)

23 (Original exhibits were attached to original transcript;
24 copies to transcript copies.)

25

Deposition of Coleman, Penny, 3/7/2014

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1 STATE OF WISCONSIN)
2) SS:
3 MILWAUKEE COUNTY)
4

5 I, Sarah A. Hart, RPR/RMR/CRR and Notary
6 Public in and for the State of Wisconsin, do hereby
7 certify that the preceding deposition was recorded by
8 me and reduced to writing under my personal
9 direction.

10 I further certify that said deposition
11 was taken at GASS WEBER MULLINS LLC, 309 North Water
12 Street, Milwaukee, Wisconsin, on the 27th day of
13 February, 2014, commencing at 10:13 a.m.

14 I further certify that I am not a
15 relative or employee or attorney or counsel of any of
16 the parties, or a relative or employee of such
17 attorney or counsel, or financially interested
18 directly or indirectly in this action.

19 In witness whereof, I have hereunto
20 set my hand and affixed my seal of office on this 3rd
21 day of March, 2014.

22 _____
23 SARAH A. HART, RPR/RMR/CRR
24 Notary Public

25 My commission expires September 27, 2015.